128-133

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.8

No. ~~290.~~ 33

J. H. W. CULLIFORD AND JOHN S. CLARK, COPARTNERS AS CULLIFORD & CLARK, ET AL., APPELLANTS,

vs.

A. J. GOMILA AND LARNED TORREY, COMPOSING THE FIRM OF GOMILA & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED SEPTEMBER 14, 1885.

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a *Transcript. Filed October 7th,* 1884.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

GOMILA & CO.
vs.
CULLIFORD & CLARK. } No. 10669.

1 *Libel. Filed July* 9, 1883.

United States District Court, Eastern District of Louisiana.

GOMILA & CO.
vs.
CULLIFORD & CLARK. } No. 11965.

To the Honorable Edward C. Billings, judge of the U. S. district court for the eastern district of Louisiana:

The libel of Gomila & Co., a firm composed of A. J. Gomila and Learned Torrey, merchants, of the city of New Orleans, La., against Culliford & Clark, of Sunderland, England, whose individual names are unknown to libellants, owners of the steamship Deronda, whereof Geo. H. Eldridge is master, in a cause of contract, civil and maritime, allege as follows:

I. That the said Culliford & Clark, having on the 19th day of June, 1883, as owners of the steamship Deronda, of Sunderland, of the burthen of 1,090 tons or thereabouts, then lying in the harbor of New Orleans, through their agents, De Wolf & Hammond, ship brokers, of this city, chartered the said vessel unto the libel-
2 lants for a voyage from the port of New Orleans to a port in the United Kingdom or on the Continent between Bordeaux and Hamburg, both inclusive, excluding Rouen, &c., charterers having option of Elsinore for orders to discharge at Copenhagen or Aarhuns, on the following terms—that is to say:

First. The said Culliford & Clark engaged that the said vessel during said voyage should be kept, in hull, boilers, and machinery, tight, staunch, and strong, classed 100 A1, and every way fitted for the voyage.

Second. That the said Culliford & Clark guaranteed that the said vessel would carry not less than 10,000 quarters of 480 lbs. each, over and above her tackle, apparel, fuel, provisions, and furniture, and the whole of said vessel, with the exception of the cabin and the necessary room for the accommodation of the crew and of the tackle, apparel, fuel, provisions, and furniture, should be at the sole use and disposal of the libellants during the said voyage.

That they would take and receive on board the said vessel during the aforesaid voyage a cargo of wheat and or maize and or rye in

bulk and or ship's sacks, as customary; and the libellants agreed with the said Culliford & Clark to charter and hire the said vessel, as aforesaid, on the following terms—that is to say:

First. The libellants engaged to provide and furnish to the said vessel a full and complete cargo of grain, not to exceed what she can reasonably carry over and above her tackle, apparel, fuel, provisions, and furniture.

3 Second. To pay to the said Culliford & Clark or their agents for the charter or freight of said vessel during the voyage aforesaid 5 shillings and 3 pence sterling per quarter of 480 pounds, delivered in full, if calling at Queenstown or Falmouth or ordered direct to Continent; if ordered to Continent from port of call, 10 per cent. additional; if ordered to United Kingdom direct, 3 pence off, charterers having option of Elsinore for orders to discharge at Copenhagen or Aarhuns at 5 shillings and 9 pence per quarter of 480 lbs. each, the freight to be paid on unloading and right delivery of the cargo.

And it was further expressly guaranteed in said charter party by the said Culliford & Clark that the said vessel would carry, after being provided, having on board, and accommodating everything necessary to class her 100 A1 and every way fitted for the voyage, not less than 10,000 quarters of 480 lbs. each, over and above her tackle, apparel, fuel, provisions, and furniture, when loaded in bulk and or ship's sacks, as customary, all which, together with all other necessary particulars, will more fully and in detail appear from the certified copy of said charter party, dated New Orleans, 19 June, 1883, hereto attached and made part of this libel, being marked Exhibit "A."

2nd. That soon after the making of said charter party, viz., on the 28th day of June, 1883, the libellants provided and furnished a cargo of 10,000 quarters of 480 lbs. each of corn to the said vessel

4 for her said voyage, and the loading of the same was then commenced and proceeded with until the 30th day of June, 1883, when all further loading of cargo was stopped by official order of the marine inspector of this port, who was present at the time and who pronounced the vessel full all over, as in fact and truth it was; that when the loading was so stopped and said vessel declared to have a full and complete cargo only $82{,}588\frac{2}{5}\frac{2}{6}$ bushels, the equivalent of $9{,}635\frac{1}{4}\frac{3}{8}\frac{0}{0}$ quarters of 480 lbs. each, had been loaded upon and into said vessel, and it was in fact impossible to properly stow upon or into said vessel any greater quantity, and said vessel was entirely unable to carry the said 10,000 quarters of 480 lbs. each, which it was so expressly guaranteed by said Culliford & Clark in said charter party she would carry as aforesaid, and the said Culliford & Clark wholly failed to keep and carry out and comply with their said guarantee.

3d. That in consequence of said failure on the part of said Culliford and Clark to perform and keep the covenants and undertakings on their part in said charter party stipulated as aforesaid and the inability of said steamship Deronda to carry said 10,000 quarters of 480 lbs. each, libellants were prevented from fulfilling and

rendered unable to comply with their contract of sale of said 10,000 quarters of corn of 480 lbs, each, with special reference to which libellants had contracted for and entered into said charter party.

That after libellants were so prevented as aforesaid by the said Culliford & Clark from delivering said 10,000 quarters
5 of corn to the buyers, and thus rendered unable to keep and comply with libellants' said contract of sale, libellants, in order to save loss as far — possible, offered said cargo, which was so loaded and upon said steamship, to said Culliford & Clark at the price at which libellants had sold the same, which offer was refused by said Culliford & Clark; and all other negotiations for a settlement failing, libellants were obliged to have said cargo sold for account of whom it may concern, and which was done, at public auction, on the 7th day of July, 1883, at 10 a. m., after notice to said Culliford & Clark, through their agents, De Wolf & Hammond, and advertisement in the newspapers of this city, that being, in the opinion of libellants, for the best interest of all parties concerned.

That libellants have in all things and at all times used their utmost endeavors to prevent, curtail, and save loss and damage to all parties in interest, and from the beginning have urged the said Culliford and Clark, their agents and their proctor, to assist libellants in said endeavor or to suggest any action which they might consider better or likely to save more than the conduct pursued by libellants, but notwithstanding all which no suggestions were made by said Culliford & Clark or any one in their behalf, and heavy loss, damage, and injury has fallen upon and been borne by libellants, as hereinafter set forth.

4. That the libellants have well and truly performed and kept all the covenants and undertakings on their part in said
6 charter party to be performed and kept, but neither the said Culliford & Clark nor their agents or the master of their said vessel have well and truly performed and kept the covenants and undertakings on the part of the said Culliford & Clark, owners as aforesaid, according to the said charter party to be performed and kept.

5. That the libellants have lost and sustained actual damage and injury to the amount $24,559.76 and upwards, as will more fully appear and in detail from the annexed schedule or statement made part hereof, which amount libellants insist the said defendants are bound in law and equity and justice to pay them, but which the defendants refuse to pay.

6. That the said Culliford & Clark have goods and chattels and property now in this port and district and within the jurisdiction of this honorable court.

7. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the U. S. and of this honorable court.

Wherefore the libellants pray that process of monition may issue to the marshal aforesaid commanding him to cite and admonish the said Culliford & Clark and the individual members thereof, whose first names are known to libellants, to be and appear be-

7 fore this hon. court on the — day of ——, or such other day to be inserted in said monition as the court may direct, then and there to answer the libellants in the premises, and if the said defendants cannot be found, then that their goods and chattels be attached to the amount sued for, and if sufficient goods and chattels cannot be found, then that their rights, debts, credits, and effects to the amount sued for be attached within this district according to the course of courts of admiralty and the rules and practice of this honorable court in civil and admiralty and maritime jurisdiction, and that this hon. court would be pleased to decree the payment of the amount due to your libellants as aforesaid, with interest at 5 % per annum from July 9th, 1883, till paid, and costs, and that they may have such other and further relief in the premises as in law and justice they may be entitled to receive.

J. WARD GURLEY, Jr,
Proctor — Libellants.

A. J. Gomila, being duly sworn, says that he is a member of the firm of Gomila & Co., the libellants herein, composed of deponent and Larned Torrey; that he has read the foregoing libel, and that all and singular the allegations thereof are true.

A. J. GOMILA.

Sworn to and subscribed before me this 9th July, 1883.

K. LOEW,
U. S. Com's.

8 *Schedule Referred to in Libel.*

Messrs. Culliford and Clark to Gomila and Company.

To amount paid E. Forestier and Co. for non-fulfillment of contract, as per annexed statement, marked X		$3,194 29
82,588 2/6 bushels sold at 60¼c. per bushel	$50,172 23	
82,588 2/6 sold by auction	29,622 84	
		20,549 39
Estimated loss on 3,126 bushels not loaded		742 42
Interest 7 days on $50,173.23, 8%		73 60
		$24,559 70

E. & O. E.
New Orleans, July 9, 1873.

9 *Statement X.*

Messrs. Gomila & Co. to E. Forestier & Co. for non-fulfillment of sale of June 6th, 1883.

10,000 qrs. No. 2 mixed corn, at 28½ per qr., cost freight and insurance	£14,062 0 0
Less freight, 5/6 per qr.	2,875 0 0
	£11,187 0 0

11,187, —%, @ ex., 4.87¾	$54,564	60
Harbor risk on 55,700, ⅜%	348	12
Cable expenses	80	00
Difference in exchange on $54,564.60, ½%	272	82
	$55,265	54
10,000 qr. No. 2 mixed corn, 85,714 2/5/6 buss. at 60¾ cts.	52,071	25
	$3,194	29

E. E.
New Orleans, June 30, 1883.

10 *Auctioneer's Return.*

I, Diego E. Murphy, a duly licensed auctioneer in and for the parish of Orleans and city of New Orleans, do hereby certify that by and in pursuance of an order from Messrs. Gomila & Co., after having advertised in the New Orleans Picayune, 2 squares 5 times, and in the Times-Democrat and the Daily States, 2 squares 3 times each, I did proceed to sell for cash, at public auction, on Saturday, the 7th day of July, 1883, at 10 o'clock a. m., on the wharf head of Washington street, opposite the steamship Deronda, for account of whom it may concern, the cargo of 82,588 bushels of inspected No. 2 mixed corn, sail grade, then on board of the English steamship Deronda, —— ——, master. After having read the advertisement, the New Orleans charter party, the certificate of the New Orleans grain inspector of the National Board of Marine Underwriters, I then read the following announcement:

"Cargo described in advertisement was loaded under charter party just read, in which it is guaranteed the steamer can carry not less than 10,000 quarters of 480 lbs. each, but that when the amount stated in advertisement, viz., 82,588 bushels, was on board the further loading was stopped by order of the marine inspector and the ship pronounced full all over. The inability of the ship to carry stipulated 10,000 qrs., in the opinion of the charterers, broke the charter party, as it did in fact their contract of sale, and was a failure on the part of the owners to comply with the terms of the charter.

11 "All negotiations for the adjustment of the matter involved having failed, this sale has been determined upon as best for the interest of all concerned. The purchaser will buy the cargo just as it is now on board, together with the privilege of the charter party just read and only such rights as he may acquire thereunder, without recourse. Two of the lay days were consumed in loading when the marine inspector pronounced the vessel full and issued the certificate."

I then, after public outcry, adjudicated the cargo of 82,588 bushels of corn to Messrs. A. Carriere & Sons, they being the last and highest bidders, at 37 cts. (thirty-seven cents) per bushel, thirty thousand five hundred and fifty-seven 56/100 dollars ($30,557.60).

D. E. MURPHY,
Auctioneer.

I, Diego E. Murphy, a duly licensed auctioneer in and for the parish of Orleans and city of New Orleans, do hereby certify that by and in pursuance of an order from Messrs. Gomila & Co., after being advertised in the New Orleans Picayune, 2 squares 5 times, and in the Times-Democrat and the Daily States, 2 squares 3 times each, I did proceed to sell for cash, at public auction, on Saturday, the 7th day of July, 1883, at 10 o'clock a. m., on the wharf head of
12 Washington street, opposite the steamship Deronda, for account of whom it may concern, the cargo of 82,588 bushels of inspected No. 2 mixed corn, sail grade, then on board of the English steamship Deronda, —— ——, master. After having read the advertisement, the New Orleans charter party, the certificate of the New Orleans grain inspector, the certificate of the bureau of inspection of the National Board of Marine Underwriters, I then read the following announcement:

"Cargo described in advertisement was loaded under charter party just read, in which it is guaranteed the steamer can carry not less than 10,000 quarters of 480 lbs. each, but that when the amount stated in the advertisement, viz., 82,588 bushels, was on board the further loading was stopped by order of the marine inspector and the ship pronounced full all over. The inability of the ship to carry stipulated 10,000 quarters, in the opinion of the charterers, broke the charter party, as it did in fact their contract of sale, and was a failure on the part of the owners to comply with the terms of the charter.

"All negotiations for the adjustment of the matter involved having failed, this sale has been determined upon as best for the interests of all concerned.

"The purchaser will buy the cargo just as it is now on board, together with the privilege of the charter party just read and only such rights as he may acquire thereunder, without recourse. Two of the lay days were consumed in loading when the marine inspector pronounced the ship full and issued the certificate."

13 I then, after public outcry, adjudicated the cargo of 82,588 bushels of corn to Messrs. A. Carriere & Sons, they being the last and highest bidders, at 37 cts. (thirty-seven cents) per bushel, viz., thirty thousand five hundred and fifty-seven $\frac{56}{100}$-- $30,557 56

Charges to advertising:

N. O. Picayune, 2 sq. 5 times	$9 00	
Times-Democrat, 2 sq. 3 times	6 00	
Daily States, 2 sq. 4 (3) times, less 25%	3 00	
State duty	152 79	
Commission	763 93	
		934 72
		$29,622 84

D. E. MURPHY,
Auctioneer.

Three receipts from the newspapers attached to auctioneer's return.

14 Form N.

New Orleans Grain Charter Party.

De Wolf & Hammond, No. 25 Carondelet street, New Orleans, steamship and ship brokers; cable address, De Wolf, New Orleans; codes used, Watkins', Scott's, and our own.

NEW ORLEANS, *June* 19, 1883.

It is this day mutually agreed between De Wolf & Hammond, as agents of the steamship Deronda, of 1,090 tons net register or thereabouts, now in New Orleans, and Mess. Gomila & Co., of New Orleans, merchants, that the said steamer shall, with all convenient speed, proceed to New Orleans, or so near thereto as she may safely get, and there, being in hull, boilers, and machinery tight, staunch and strong, classed 100 A 1, and every way fitted for the voyage, shall load as customary at such safe loading berth, always afloat, as ordered by charterers on arrival (and if afterwards required by them to shift, they to pay the ordinary expense of towing), a full and complete cargo of wheat $\frac{\text{and}}{\text{or}}$ maize $\frac{\text{and}}{\text{or}}$ rye in bulk $\frac{\text{and}}{\text{or}}$ ship's sacks, as customary, which is to be brought to and taken from alongside as customary, at merchants' risk and expense, at ports of loading and discharge (all lighterage required to be paid for by cargo) and at charterers' risk, not exceeding what she can reasonably carry over and above her tackle apparel, fuel, provisions, and furniture, and, being so loaded, shall therewith proceed under steam to a safe port, always afloat, in the United Kingdom or on the Continent, between Bordeaux and Hamburg, both inclusive, excluding Rouen, calling at Queenstown or Falmouth for orders, which are to be given within twelve hours of arrival or lay days to count, or so near thereunto as she may safely get, one port only to be used, and deliver the same on being paid freight, all in British sterling, as follows:

Five shillings and three pence sterling per quarter of 480 pounds weight, delivered in full, if calling at Queenstown or Falmouth or ordered direct to Continent. If ordered to Continent from port of call, ten per cent. additional. If ordered to United Kingdom direct, three pence off—

Charterers having option of Elsinore for orders to discharge at Copenhagen or Aarhuns at five shillings and nine pence per quarter at 480 lbs. Steamer is guaranteed to carry not less than ten thousand quarters of 480 lbs.

In full of all port charges, pilotages, and other charges usually paid by steamers (the act of God, the public enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, boilers, machinery, and steam navigation of whatever nature and kind soever during the said voyage always mutually excepted).

1. Steamer to be ceiled and dunnaged at owners' expense.

2. The carpenter employed for ceiling to be approved by charterers.

3. Elevating charges for bulk grain to be paid by charterers.

4. Stevedore for loading said steamer to be appointed by charterers, under captain's directions, at current rates for such labor. Charterers are not to be held responsible for improper stowage.

5. Steamer to have liberty to call at any ports for coal or other supplies.

6. Steamer to have liberty to tow and assist vessels in all situations, and to proceed with or without pilots.

7. The freight to be paid on unloading and right delivery of the cargo in cash, without discount, if in the United Kingdom; if on the Continent, in cash at current rate of exchange for bankers, eight days' sight bills on London.

8. Sufficient cash for steamer's ordinary disbursements at loading port to be advanced by De Wolf & Hammond, at the current rate of exchange, vessel paying 2½ per cent. commission and cost of insurance thereon; the captain to draw at 30 days' sight upon charterers' agent at port of discharge or on his owners, payable in London, or five days after arrival, at charterers' option, against the amount of freight due under this charter, and the amount of the draft to be deducted from the freight on settlement, if not previously paid.

9. Bills of lading to be signed as and when presented, without prejudice to this charter. Any difference in the amount of freight between the bills of lading and this charter party shall be settled at port of loading before the steamer sails. If in her favor, to be paid in cash at current rate of exchange, less insurance; if in charterers' favor, by captain's draft, payable three days after arrival of steamer at port of discharge, or at 30 days' sight on charterers' agent at port of discharge, or on his owners (payable in London) at charterers' option.

10. Should the steamer be ordered to discharge at a port where there is not sufficient water for her to enter the first tide after arrival and to lie always afloat, lay days are to count from 24 hours after arrival at the port, and any lighterage incurred to reach the port of discharge is to be at the expense and risk of the receivers of the cargo, any custom of the port to the contrary notwithstanding.

11. Should the steamer be ordered to a port of discharge on the Continent inaccessible by reason of ice on the steamer's arrival, the master to have the option of waiting until the port is again open or of proceeding to the nearest safe open port or roadstead (telegraphing his arrival there to freighters), where he shall receive fresh orders for an open and accessible port of discharge in the United Kingdom or Continent, as above, within 24 hours of arrival or lay days to count. If so ordered the steamer shall receive the same freight as if she had discharged at the port to which she was originally ordered; but if ordered to a port more than 100 nautical miles distant from such open port or roadstead, the freight shall be increased by three pence per quarter. In no case shall the steamer be ordered from a port of call in the United Kingdom to an ice-bound port.

12. Should dunnage or ballast be required the same to be furnished by owners.

13. Sixteen running days, Sundays excepted, are to be allowed the said merchants (if the steamer is not sooner dispatched) for loading and discharging and ten days on demurrage, over and above the said lay days, at six pence sterling per gross register ton per day.

14. Should the steamer not be ready to load at New Orleans on or before the — ——, charterers or their agents have the option of cancelling this charter.

15. Lay days to commence the day after the steamer is declared ready to receive cargo and having been passed by the surveyor of grain vessels and written notice given by the master to the charterers or their agents.

16. Loading days to be endorsed on captain's copy of charter party; the charterers' liability on this charter to cease when the cargo is shipped, provided the same be worth freight, dead freight, and demurrage at port of discharge; the master and owners have an absolute lien on the cargo for all freight, dead freight, and demurrage.

17. Steamer to be consigned to De Wolf & Hammond, at New Orleans, paying them an address commission of 2½ per cent. on the amount due under this charter party.

18. A commission of 5 per cent. on all freight, dead freight, and demurrage is due on execution of this charter party (vessel lost or not lost), to ——.

19. Penalty for non-performance of this agreement, estimated amount of freight.

(Signed) DE WOLF & HAMMOND,
Ag'ts by Cable Authority.

(Signed) GOMILA & CO.

Witness to the signatures of both parties:
C. G. DEFFARGE.

Certified to be a true copy of the original charter party in our possession. —— ——.

[Written across the face in red ink.]

JUNE 29, 1883.

This charter party has been cancelled, and at the request of A. J. Gomila, of Gomila & Co., similar charter parties made out to E. Forestier & Co., and the copies of said charter party previously given to Mess. Gomila & Co. have been returned to us by E. Forestier & Co. & destroyed.

(Signed) DE WOLF & HAMMOND.

15 *Order for Process.*

Telegram received July 7, '83, at 10 a. m.

NEW HAVEN, CONN., *7th July*, '83.

To John Devonshire or K. Loew, clerk's office U. S. district court, custom-house building, New Orleans:

In Forester & Co. against owners of steamer Deronda, upon filing libel and affidavit showing amount due, let a warrant issue of arrest of the defendant with a claim therein that if he cannot be found to attach his goods and chattels or, in default of them, his credits and effects to the amount sued for, according to rules 2 and 7; the attachment may be dissolved upon defendant giving stipulation, with sufficient sureties, exceeding by one-third amount claimed.

Sureties may justify before Commissioner Loew.

EDWARD C. BILLINGS.

Writ of Attachment. July 9th, 1883.

UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana.

GOMILIA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

The President of the United States to the U. S. marshal of said — or his lawful deputy, Greeting:

16 You are hereby commanded in the name of the United States of America and of our district court if you do not find Culliford and Clark, the defendants, in your district that you attach their ships, goods, and chattels and, in default of them, their rights, credits, and effects to the amount of $24,557.70, claimed by libellants, in whose hands soever the same may be found within your district.

And of your doings in the premises you will make due return hereon.

Witness the Hon'ble Edward C. Billings, judge of said court, and the seal thereof, at New Orleans, this 9th day of July, 1883.

[SEAL.] K. LOEW, *D'y Clerk.*

Marshal's Return.

Received July 9th, 1883, by the U. S. marshal, and on the same day, month, and year I did execute the within writ of attachment by seizing and taking into my possession the steamship Deronda, her tackle, machinery, sails, and rigging, and on the 12th day of the same month and year said seizure was released by order of this hon-

orable court and the property seized released to defendants through the captain of the steamship Deronda. The order of release, upon bond having been furnished by the defendants, was duly re-
17 turned into court this 12 July, 1884.

J. R. G. PITKIN, *U. S. M'l,*
By E. S. WURZBURGER,
D'y Marshal.

Affidavit of A. J. Gomila. Filed July 9, 1883.

GOMILIA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

A. J. Gomila, being duly sworn, says that he is a member of the firm of Gomila & Co., the libellants herein; that libellants have a just claim against the said Culliford & Clark and an admiralty right of action therein, as fully set up in libellants' libel, filed herein this day; that the said Culliford & Clark reside in Sunderland, Eng., and deponent fears they cannot be found in this district, and believes a writ of attachment against their goods, chattels, credits, and effects which may be found in this district, to the amount sued for, is necessary for the protection and security of libellants' claim, rights, and interest herein.

A. J. GOMILA.

Sworn to and subscribed before me this 9th July, 1883.

K. LOEW,
U. S. Com'r.

18 *Petition to Bond Vessel. Filed July* 12, 1883.

U. S. Dist. Court, East. District of Louisiana.

A. J. GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

To the honorable the judge of said court:

The petition of G. H. Eldridge, master of the S. S. Deronda and as such entitled to the possession thereof, respectfully represents that he is the master of said steamship attached in this cause, and prays that the said attachment of said vessel may be released and discharged and the said vessel delivered to him for the owners thereof, reserving unto the owners thereof all and all manner of benefit of exception, objection, and nullities in the proceedings herein and in no manner waiving any right to set up, allege, and insist upon any and all nullities, imperfections, and irregularities in the libellants' proceedings and actions herein, upon giving bond in due form, with good and sufficient surety, in the sum of $32,800.

GEO. H. ELDRIDGE, *Master.*

Bond. Filed July 12, 1883.

Know all men by these presents that we, J. H. W. Culli-
19 ford and John S. Clark, under the firm name and style of Culliford & Clark, and Thos. D. Miller and Emile L. Carriere of the city of New Orleans, as sureties, are held unto A. J. Gomila and Larned Torrey, copartners under the firm style and name of A. J. Gomila & Co., in the penal sum of thirty-two thousand eight hundred dollars ($32,800); for the payment whereof to the said A. J. Gomila and Larned Torrey, their executors, administrators, or assigns, we, jointly and severally, bind ourselves, our heirs, executors, and administrators, respectively, by these presents, as witness our respective names hereunto affixed, at New Orleans, this 12th day of July, in the year 1883.

Whereas, in and by virtue of a writ of attachment issued out of the district court of the United States for the eastern district of Louisiana, sitting in admiralty, at the suit of A. J. Gomila & Co. *vs.* Culliford & Clark, and numbered 11965 on the docket of said court, and which suit is now pending therein, the following-described property, to wit, the steamship Deronda, her tackle, &c., has been seized and taken into custody of the said United States and detained according to law, but the same has been released and the attachment thereon set aside upon the appearance of Culliford & Clark in the said suit and the execution and delivery of the present obligation, the condition of which is such that if the said
20 Culliford & Clark shall satisfy such judgment as may be rendered against them in the suit pending as above mentioned, then this obligation is to be void, or else to remain in full force.

(Sig.) CULLIFORD & CLARK,
Per GEO. H. ELDRIDGE,
Master S. S. Deronda.
(Sig.) THOS. D. MILLER.
(Sig.) E. L. CARRIERE.

Signed and delivered in presence of—
K. LOEW, *U. S. Com'r.*

STATE OF LOUISIANA, *Eastern District:*

CLERK'S OFFICE U. S. DISTRICT COURT.

I, Thomas D. Miller & Emile L. Carriere, each do solemnly swear that I reside in the parish of Orleans; that I have property in my own right, unincumbered and of sufficient value to satisfy amount of within bond, and that after the payment of all my debts and liabilities I am worth over and above the said amount, and that I am not tutor of minor children; that there exists no legal impediment to my signing said bond, and that I have not signed any obligation which may vitiate the validity of this bond.

THOS. D. MILLER.
E. L. CARRIERE.

Sworn and subscribed before me this 12th July, 1883.

K. LOEW,
U. S. Com'r.

21 DISTRICT OF LOUISIANA, *ss:*

United States District Court.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11695.

CLERK'S OFFICE, NEW ORLEANS, —— —, ——.

The President of the United States of America to the marshal of the district of Louisiana or his lawful deputy, Greeting:

Whereas G. H. Eldridge, master of the ship Deronda, attached in this cause, hath this day filed a petition on behalf of the owners of said ship praying a release of same on bond, and which said petition is now of record in this office, you are hereby authorized to release the said ship from seizure and her to restore to the possession and custody of said claimant, he having given bond conditioned as required by law and otherwise complied with the rules of the court, &c., and make return hereon of your doings in the premises.

Witness the Hon. Edward C. Billings, judge of said court, at New Orleans, this 12 day of July, A. D. 1883, and the 108th year of the Independence of the United States.

[SEAL.] K. LOEW, *D'y Clerk.*

[Endorsed:] United States district court, district of Louisiana. No. —. —— —— *versus* —— ——. Writ of release. Rec'd July 12, '83, and on the same day did comply with the within order to release as therein directed. J. R. G. Pitkin, U. S. m'l, by E. S. Wurzberger, d'y m'l.

22 UNITED STATES OF AMERICA,
Eastern District of Louisiana:

District Court of the United States, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

The President of the United States of America to Culliford & Clark:

You are hereby summoned to comply with the demand contained in the libel of which a copy accompanies this citation or to deliver your answer to the same in the office of the clerk of the district court of the United States for the eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the Honorable Edward C. Billings, judge of the said court, at the city of New Orleans, this 13th day of July, A. D. one thousand eight hundred and eighty-three, and of the Independence of the United States of America the 108th year.

[SEAL.] K. LOEW, *D'y Clerk.*

[Endorsed:] No. 11965. United States district court, eastern district of Louisiana. Gomila & Co. *vs.* Culliford & Clark. Copy of petition and citation inside to be served on —— ——.

Marshal's Return.

Rec'd July 13, '83, & on July 13, '83, I served a true copy of the within citation and the accompanying copy of libel on the firm of Culliford & Clark by handing the same to George H. Eldridge, Esq., the master of the steamship Deronda, in person, in the city of New Orleans, Culliford & Clark being non-residents of the eastern district of La.

J. R. G. PITKIN,
U. S. Marshall Eastern District of La.,
By E. S. CURRY,
D'y U. S. Marshall.

23 *Answer. Filed November 25th*, 1883.

District Court of the U. S., Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

To the Honorable Edward C. Billings, judge of said court:

And now comes the defendants named in the libel herein, J. H. W. Culliford and John S. Clark, impleaded as copartners under the firm name of Culliford & Clark, and, saving and reserving unto themselves and each of them all objections and all manner of exceptions and causes of demurrer to the many and manifest errors, insufficiencies, and uncertainties in said libel and proceeding contained and appearing on the face thereof, and for exception and causes to said libel of complaint, or to so much thereof as they are advised is material, important, and necessary for them to make answer unto, articulately propound and say:

1st. For answer to all and singular the allegations contained in the several articles of said libel numbered, respectively, 1, 2, 3, 4, 5, 6, & 7, and the several portions thereof, respondents deny that the same are true and correct, except only as may be hereafter stated and admitted.

24 Further answering the first article of said libel, respondents say that it is not true, as in said libel alleged, that on the 19th day of June, 1883, or at any time before or since that date

the firm of Culliford & Clark was the owner of the said steamship, Deronda, or any part or share thereof or therein; that the truth is that before, at, and at all times since that date the said steamship was the sole property of J. H. W. Culliford individually and not the property of the firm of Culliford & Clark, as averred in said libel.

That the firm of Culliford & Clark was the agent of the said owner and transacted the business of said vessel while engaged in commerce, *by* the vessel was and is owned by and registered in the name of said Culliford.

That it is true that said steamship was of the tonnage of 1,090 tons or thereabouts, and that on the days named in said articles was in the port of New Orleans, and that Messrs De Wolf and Hammond were the agents of the said owner thereof, J. H. W. Culliford, and the co-respondents of the firm of Culliford & Clark, defendants; that as to the other matters set forth in said article the same are not true in manner and form as therein set forth.

That the truth is that on the 19th day of June, 1883, the said libellants did enter into negotiations with De Wolf & Hammond for a charter party; that said negotiations resulted in the
25 execution of a charter party, a true copy whereof is annexed hereto and made part of this answer and marked Gomila "A."

That shortly after the contract was made and signed and before any cargo was offered to the vessel libellants informed Messrs. De Wolf & Hammond that their interests and obligations in said contract had been transferred to Messrs. E. Forestier & Co. The said contract of charter party was delivered back to the agents of the defendants by E. Forestier & Co., and in due form cancelled, and by and with the agreement of all parties was so dissolved and cancelled and a new and different charter party for said vessel made and entered into with the said E. Forestier & Co. as charterers, which said new contract was in the words and figures of Exhibit B annexed to this answer, the same being a true copy thereof and the only contract of charter party under which said vessel was loaded.

That said charter party in all of its conditions has been executed and carried out and performed by the owner of said vessel Deronda.

And said respondents insist and say that from and after the cancellation and dissolution of the contract marked Gomila A, as hereinabove stated, the said libellants had no charter-party contract relating to said vessel.

Second. And, further answering the 2d article of said libel, respondents say that the said charter-party contract an-
26 nexed to this answer by copy thereof, marked Exhibit B, is the only contract of charter party binding upon the said owner of the steamship Deronda, and that the same contains and sets forth all of the stipulations and obligations thereof, and that in so far as article 2nd of said libel sets forth that said contract was with the said libellants, and in so far as said article sets out any pretended stipulations and averments differing from the terms and obligations of said charter party annexed to this answer as Exhibit B, said article is untrue and not the fact.

That at the time when said vessel was so under charter she was not chartered to the libellants, but to E. Forestier & Co., as hereinbefore set forth in this answer, and that the said charterers, E. Forestier & Co., have made no complaint or pretence that the owner of said Deronda has not in all things executed his contract according to the terms thereof.

That at the time set forth in said article libellants had no charter contract relating to said vessel, and that the matters in said article set forth wherein it is alleged that the owner of said vessel or these respondents were parties to any contract of charter party with said libellants relating to said vessel are untrue, and that the truth is that the said vessel was capable of and did carry and deliver the ten thousand (10,000) quarters of grain, as per guaranty and condition in the said charter party with E. Forestier & Co., marked Exhibit B.

27 3rd. And, further answering the third article of said libel, respondents say that, as stated in said copy of charter party, Exhibit B, the owner of said vessel, through his agents, did agree to take on board said vessel the quantity of grain named in said charter party at the rate named in said charter party, and that the said vessel and the owner thereof did in all things fully perform each and all of its several covenants and obligations set forth in said charter party, took on board the full quantity of grain named in said charter party, and proceeded to sea with said cargo and safely delivered the same at the designated port of delivery in good order and condition and in all things carried out and executed said contract, marked Exhibit B, in each and every detail, without any default.

4th. And, further answering the 4th article of said libel, respondents say that the said libellants were no parties to any charter of the said steamship Deronda with said libellants, Gomila & Co., at the time complained of; that the said owner of the said Deronda in all things performed each and every obligation of the said charter party actually in force, as hereinabove explained, and made no default therein.

5th. And, further answering the 5th article of said libel, respondents say that the said libellants have sustained no loss by any act of respondents, and that said article and the matters therein stated are untrue in manner and form as therein stated and set forth.

28 And, as to all matters not hereinbefore specially admitted, traversed, or avoided, respondents deny the same; and your respondents specially reserve the right to bring suit hereafter to recover from the libellants herein all and singular the loss and damages occasioned them by the institution of the present suit and all other acts and doings of the said libellants, Gomila & Co., in the premises.

Wherefore said respondents, by reason of the premises and for the reason that the commercial firm of Culliford & Clark are not and were not the owners of said steamship Deronda nor any part, portion, or tackle or equipment thereof at the time stated in said libel and were but agents of the owner, residing beyond the limits of the United States, and not personally or as a copartnership bound to

respond in damages for or concerning said vessel, pray that the attachment herein be dissolved and said libel dismissed with costs, and will ever pray, and as in duty bound, and c.

J. McCONNELL,
J. R. BECKWITH,
HORANC B. UPTON,
Proctors.

Will'm J. Hammond, being duly sworn, deposes and says that he is a member of the commercial firm of De Wolf & Hammond, ship brokers and agents in the city of New Orleans; that their said firm were the agents of the steamship Deronda on the dates named
29 in the foregoing answer; that J. H. W. Culliford, who resides in Sunderland, England, beyond the limits of the United States, was the owner of said steamship Deronda, and that no other person or persons had any interest therein, and that affiant's said firm were and are the agents of said J. H. W. Culliford; that he has read the foregoing libel, and that all and singular the allegations thereof are true.

WM. J. HAMMOND.

Sworn to and subscribed before me this 29th November, '83.
J. DEVONSHIRE,
U. S. Com'r.

30 *New Orleans Grain Charter Party.*

De Wolf & Hammond, No. 25 Carondelet street, New Orleans, steamship and ship brokers; cable address, De Wolf, New Orleans; codes used, Watkins', Scott's, and our own.

NEW ORLEANS, 19*th June*, 1883.

It is this day mutually agreed between De Wolf & Hammond, as agents of the steamship Deronda, of 1,090 tons net register or thereabouts, now in New Orleans, and Messrs. E. Forrestier & Co., of New Orleans, merchants, that the said steamer shall, with all convenient speed, proceed to New Orleans, or so near thereto as she may safely get, and there, being in hull, boilers, and machinery tight, staunch, and strong, classed 100 A 1, and every way fitted for the voyage, shall load as customary at such safe loading berth, always afloat, as ordered by charterers on arrival (and if afterwards required by them to shift, they to pay the ordinary expense of towing), a full and complete cargo of wheat $\frac{\text{and}}{\text{or}}$ maize $\frac{\text{and}}{\text{or}}$ rye in bulk $\frac{\text{and}}{\text{or}}$ ship's sacks, as customary, which is to be brought to and taken from alongside, as customary, at merchants' risk and expense at ports of loading and discharge (all lighterage required to be paid for by cargo) and at charterers' risk, not exceeding what she can reasonably carry over and above her tackle, apparel, fuel, provisions, and furniture, and, being so loaded, shall therewith proceed under steam to a safe port, always afloat, in the United Kingdom or on the Continent, between Bordeaux and Hamburg, both inclusive, excluding Rouen, calling

at Queenstown or Falmouth for orders, which are to be given within twelve hours of arrival or lay days to count, or so near thereunto as she may safely get, one port only to be used, and deliver the same on being paid freight, all in British sterling, as follows:

Five shillings and three pence sterling per quarter of 480 pounds weight, delivered in full, if calling at Queenstown or Falmouth or ordered direct to Continent. If ordered to Continent from port of call, ten per cent. additional. If ordered to United Kingdom direct, three pence off—

Charterers having option of Elsinore for orders to discharge at Copenhagen or Aarhuns at five shillings and nine pence per quarter of 480 lbs. Steamer is guaranteed to carry not less than ten thousand quarters of 480 lbs. each.

In full of all port charges, pilotages, and other charges usually paid by steamers (the act of God, the public enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, boilers, machinery, and steam navigation of whatever nature and kind soever during the said voyage always mutually excepted).

1. Steamer to be ceiled and dunnaged at owners' expense.

2. The carpenter employed for ceiling to be approved by charterers.

3. Elevating charges for bulk grain to be paid by charterers.

4. Stevedore for loading said steamer to be appointed by charterers, under captain's directions, at current rates for such labor. Charterers are not to be held responsible for improper stowage.

5. Steamer to have liberty to call at any ports for coal or other supplies.

6. Steamer to have liberty to tow and assist vessels in all situations, and to proceed with or without pilots.

7. The freight to be paid on unloading and right delivery of the cargo in cash, without discount, if in the United Kingdom; if on the Continent, in cash at current rate of exchange for bankers, eight days' sight bills on London.

8. Sufficient cash for steamer's ordinary disbursements at loading port to be advanced by De Wolf & Hammond, at the current rate of exchange, vessel paying 2½ per cent. commission and cost of insurance thereon; the captain to draw at 30 days' sight upon charterers' agent at port of discharge or on his owners, payable in London, or five days after arrival, at charterers' option, against the amount of freight due under this charter, and the amount of the draft to be deducted from the freight on settlement, if not previously paid.

9. Bills of lading to be signed as and when presented, without prejudice to this charter. Any difference in the amount of freight between the bills of lading and this charter party shall be settled at port of loading before the steamer sails. If in her favor, to be paid in cash at current rate of exchange, less insurance; if in charterers' favor, by captain's draft, payable three days after arrival of steamer at port of discharge, or at 30 days' sight on charterers' agent at port of discharge, or on his owners (payable in London), at charterers' option.

10. Should the steamer be ordered to discharge at a port where there is not sufficient water for her to enter the first tide after arrival and to lie always afloat, lay days are to count from 24 hours after arrival at the port, and any lighterage incurred to reach the port of discharge is to be at the expense and risk of the receivers of the cargo, any custom of the port to the contrary notwithstanding.

11. Should the steamer be ordered to a port of discharge on the continent inaccessible by reason of ice on the steamer's arrival, the master to have the option of waiting until the port is again open or of proceeding to the nearest safe open port or roadstead (telegraphing his arrival there to freighters), where he shall receive fresh orders for an open and accessible port of discharge in the United Kingdom or Continent, as above, within 24 hours of arrival or lay days to count. If so ordered the steamer shall receive the same freight as if she had discharged at the port to which she was originally ordered, but if ordered to a port more than 100 nautical miles distant from such open port or roadstead, the freight shall be increased by three pence per quarter. In no case shall the steamer be ordered from a port of call in the United Kingdom to an ice-bound port.

12. Should dunnage or ballast be required the same to be furnished by owners.

13. Sixteen running days, Sundays excepted, are to be allowed the said merchants (if the steamer is not sooner dispatched) for loading and discharging and ten days on demurrage, over and above the said lay days, at six pence sterling per gross register ton per day.

14. Should the steamer not be ready to load at New Orleans on or before the — ——, charterers or their agents have the option of cancelling this charter.

15. Lay days to commence the day after the steamer is declared ready to receive cargo and having been passed by the surveyor of grain vessels and written notice given by the master to the charterers or their agents.

16. Loading days to be endorsed on captain's copy of charter party; the charterers' liability on this charter to cease when the cargo is shipped, provided the same be worth freight, dead freight, and demurrage at port of discharge; the master and owners have an absolute lien on the cargo for all freight, dead freight, and demurrage.

17. Steamer to be consigned to De Wolf & Hammond, at New Orleans, paying them an address commission of 2½ per cent. on the amount due under this charter party.

18. A commission of 5 per cent. on all freight, dead freight, and demurrage is due on execution of this charter party (vessel lost or not lost) to ——.

19. Penalty for non-performance of this agreement, estimated amount of freight.

(Signed) DE WOLFE & HAMMOND,
Agents by Cable Authority.

(Signed) E. FORRESTIER & CO.

Witness to the signature of both parties:
C. J. DEFFARGE.

Certified to be a true copy of the original charter party in our possession.

DE WOLF & HAMMOND.

Endorsed: New Orleans, 14 July, 1883. The vessel has consumed three days in loading the within cargo. J. B. Camors & Co.

31 The charter party to Gomila and Co. is copied at page 14 of this transcript.

Order on Repondents to Produce Documents. *Dec'r* 18, 1883.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

On motion of J. Ward Gurley, Jr., and upon suggesting to the court that it is necessary, in the interest of libellants, that they should have an opportunity of inspecting all the cables and letters which passed between Messrs. De Wolf and Hammond, agents of the owners, or either of them, Messrs. Culliford and Clark, or either of them, and J. H. W. Culliford, from the 1st day of June, 1883, to, say, the last day of July, 1883, in any manner relating to this controversy or the chartering of the steamship Deronda to Gomila & Co., and upon further suggesting to the court that it is necessary that the original charter party entered into between libellants and the said De Wolf and Hammond as agents of the owners of the steamer Deronda should be filed in this record for the information of the court, and upon further suggesting to the court that the only existing copy of said charter party is in the possession of said De Wolf and Hammond, it is ordered that Wm. H. De Wolf, a member of the said firm of De Wolf and Hammond, be summoned to appear before Commissioner John Devonshire, at the clerk's office of this court, on Wednesday, December 19, at 3 p. m., and then and there pro-
32 duce all the cables and letters which passed between the said De Wolf and Hammond, or either of them, and the said Culliford and Clark, or either of them, or J. H. W. Culliford from the 1st day of June, 1883, to, say, the last day of July, 1883, which may in any manner relate or refer to any of the matters of this controversy or to the chartering of the steamer Deronda to Gomila and Co., and also the original charter party of said steamer to Gomila and Co.

Service.

On same day, month, and year served a true copy of within *subpœna duces tecum* on Wm. H. De Wolf by leaving same in — hands in the city of New Orleans.

(Signed) J. R. G. PITKIN,
U. S. Marshal,
By JNO. N. SIMONDS,
D'y U. S. Marshal, Eastern District of Louisiana.

Renewal of Order. January 17, 1884.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

On motion of J. Ward Gurley, Jr., proctor for libellants, and upon suggesting to the court that on the 18 December, 1883, an order was issued herein commanding Wm. H. De Wolf to appear before John Devonshire, Esq., commissioner, on the 19 December, 1883, at 3 p. m., and then and there to produce certain cables and letters designated in said order, and that the said De Wolf did appear before said commissioner upon the adjourned days agreed upon for
33 the taking of his testimony and produced part of the papers so ordered to be produced, and admits, in his testimony, that he has in his possession or in the possession of his firm, De Wolf & Hammond, — relating to this cause and included in said order which he has not produced; and upon further suggesting that papers and letters so retained are necessary for the information of the court herein and for the interest of libellants:

It is ordered that said Wm. H. De Wolf be summoned to appear before Commissioner John Devonshire Friday, January 18, 1884, at 3 p. m., and then and there produce each and every letter and paper and writing designated in the order of the 18 December, 1883, or as many as he or his said firm of De Wolf and Hammond has now in his or their possession or under his or their control or which he or they had possession or control of at the time of the service of the said order of 18 December, '83, and that proctors for claimant be notified of this order.

Service.

Received, January 17, '84, by the U. S. marshal, and on 17 January, '84, served true copy of the within rule on W. H. De Wolf by handing the same to him in person.

(Signed) DAN. A. ROSE,
D'y U. S. Marshal.

Service accepted only for myself.

(Signed) J. R. BECKWITH.

January 17, '84, copy served on H. E. Upton for McConnell and Upton.

(Signed) DAN. A. ROSE,
D'y U. S. Marshal.

34 *Document Marked Gomila No.* 1.

Grain contract. Seller's copy.

Sold by Gomila & Co. to Messrs. E. Forestier & Co., at the price of (60) sixty cents per bushel of 56 pounds, on board seller's vessel, with

freight at 6 shillings per quarter, and to be shipped from New Orleans during the month of June (not later than the 30th), midnight, seller's option, a cargo of not over twelve thousand and not under ten thousand quarters (480 lbs.) of No. 2 mixed corn of the standard of New Orleans inspection; destination, Elsinore; for orders to Copenhagen or Aarhuns; any difference in freight for account of seller; cash on delivery of documents.

New Orleans, June 7th, 1883.

(Signed) E. FORESTIER & CO.

Document Gomila No. 2.

Bureau of inspection of the National Board of Underwriters.

NEW ORLEANS, *June* 30, 1883.

This is to certify that the British S. S. Deronda, Elridge, master, of 1,090 tons measurement, built at Sunderland in 1877, has completed her loading of grain in bulk and sacks at this port under this inspection, and has conformed to all the rules of the National Board of Marine Underwriters in relation thereto. She is now properly laden to proceed on her voyage to Europe.

(Signed) W. M. BAKER, *Surveyor.*

35 *Particulars of Loading.*

Cargo consists of 67,002 bushels of corn in bulk.
15,586 in bags, equal to 5,786 bags.

Total, 82,588, equal to 2,064 tons.

Draft of water, loaded, 21.2 forward, 21.2 aft; free board, 4 feet 8 inches.

Gomila No. 3.

NEW ORLEANS, 13 *July*, 1883.

Messrs. E. Forestier & Co., A. Carriere & Sons, J. B. Camors & Co., and all whom it may concern.

GENTLEMEN: The British S. S. Deronda is ready to receive and stow the balance of cargo stipulated in charter party to E. Forestier & Co., of date 19 June, 1883. We request the prompt delivery of 365 quarters of grain necessary to complete the cargo.

It is our desire to clear the vessel at the earliest possible moment.

Enclosed please find copy of surveyor's certificate.

Yours respectfully,

(Signed) DE WOLF & HAMMOND.

Gomila No. 4.

NEW ORLEANS, 13 *July*, 1883.

Messrs. De Wolf & Hammond.

GENTLEMEN: The S. S. Deronda finished restoring her cargo
36 last evening under the inspection of Capt. Baker and myself, and is now ready to complete her loading.

You will please let us know when she will commence taking in the remainder of her cargo, and we think — will take about 100 tons more.

(Signed) TH'S CONWAY.

We hereby certify this to be a true copy of the original in our possession.

(Signed) DE WOLF & HAMMOND,
Agents S. S. Deronda.

Gomila No. 5.

Protest.

STATE OF LOUISIANA, *Parish & City of New Orleans:*

Be it known that on this 12 day of July, in the year of our Lord 1883, before me, Andrew Hero, Jr., a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared Anthony J. Gomila, a member of the firm of Gomila & Co., of this city, who declared that whereas, under date of the 19th day of June, 1883, a contract of affreightment or charter party was made and entered into with the owners of the steamship Deronda, through their representatives, Messrs. De Wolf & Hammond, of this city, for a cargo of grain, to be shipped on said steamship Deronda by said Gomila & Co. under the guarantee that said steamship should carry not less than 10,000 quarters of 480 pounds, and which said contract was duly
37 signed and executed by said Messrs. De Wolf & Hammond on behalf of said steamship Deronda and owners, and for said firm of Gomila & Co. by said Gomila for his said firm, and according to usage and custom the original contract or charter party so signed and executed is in the custody of said Messrs. De Wolf & Hammond and a certified copy thereof was furnished to said Gomila Co. & for their use;

And whereas the copy of said original contract was provisionally delivered unto Wm. E. Forestier & Co., of this city, and whilst in their charge or custody was destroyed by the aforesaid Messrs. De Wolf & Hammond without the knowledge or consent of said Gomila & Co. and another set of charter-party papers signed and executed by said De Wolf & Hammond and said E. Forestier & Co., of date of June 19, 1883, identical with that of said Gomila & Co., except in the substitution of the name of E. Forestier & Co. for that of Gomila

& Co., and by reason of such destruction of the aforesaid copy of said original contract, delivered as aforesaid unto said Messrs. E. Forestier & Co., the said Messrs. Gomila & Co. have no copy nor any written evidence of the aforesaid contract or charter party of June 19, 1883, made by them, and, though the original is on file in the office of said Messrs. De Wolf & Hammond, as agents of said steamship Deronda, yet upon demand they have refused to issue or deliver a certified copy of the said charter made with said Gomila & Co., of date of June 19th, 1883;

And whereas the said steamship Deronda has not the capacity to carry 10,000 quarters of grain of 480 pounds and by reason of her failure to receive and stow that quantity the sale that has been made of the cargo of corn proposed to be shipped in said steamship Deronda was declined or not accepted by the buyer;

And whereas in consequence thereof the cargo of 82,588 $\frac{2}{5}$ $\frac{2}{5}$ bushels of inspected No. 2 mixed corn, sail grade, on board of said
38 steamship Deronda, together with the privilege of the aforesaid charter party of said Gomila & Co. of date of June 19th, 1883, was exposed for sale at public auction on Saturday, the 7th day of July, 1883, at the head of Washington street, in this city, under the ministry of Diego E. Morphy, a duly licensed auctioneer of this city, for account of whom it may concern, and at said public sale the same was sold to Messrs. A. Carriere & Sons, of this city, as the highest and last bidders thereon, for the price and sum of thirty-seven cents per bushel;

And whereas the said Messrs. Carriere & Sons, as owners of the corn on said steamship, desire a copy of the contract or charter party of June 19th, 1883, entered into with said Gomila & Co., and, though duly demanded of said Messrs. De Wolf & Hammond, they refuse to issue or deliver a certified copy of the original contract or charter party in the premises, and by reason thereof the owners of the aforesaid cargo are necessitated to use the copy of the alleged charter party executed with said E. Forestier & Co.;

And whereas the failure of the said steamship Deronda to take and receive the stipulated quantity of grain and the unauthorized destruction of the contract of affreightment entered into with the agents or owners of said steamship, as well as the refusal of said De Wolf & Hammond to furnish and deliver another copy of said contract, and the necessity that has arisen thereby of the owners of the cargo of corn on said steamship being compelled to use and avail themselves of a copy of the alleged contract of charter of said E. Forestier & Co., has caused great inconvenience, loss, and damage, and said Messrs. Gomila & Co. have at all times protested against the aforesaid illegal acts and doings of said Messrs. De Wolf & Hammond and desire that their formal protest be made of record against the owners of said cargo being necessitated to use a copy of the said alleged contract of charter made with E. Forestier & Co. instead of the proper and uncancelled contract of charter had with said Gomila & Co.:

39 Now, therefore, said Anthony J. Gomila, on behalf of his said firm of Gomila & Co., moreover declared that he does

by these presents publicly and solemnly protest, and I, said notary, at the request aforesaid, do by these presents publicly and solemnly protest, against the use of a copy of said alleged contract or charter party signed by E. Forestier & Co., necessitated or imposed upon the owners of said cargo of grain, as well as against the aforesaid illegal and unwarranted acts and doings of the owners and agents of said steamship Deronda and the failure of said steamship to take and to carry the stipulated quantity of grain, as well as against all parties concerned, for all inconvenience, loss, damage, or injury suffered or to be suffered in the premises.

Thus done and protested in the presence of Messrs. Sosthene Theriot, Jr., & J. J. Ward, competent witnesses, both of this city, who hereunto sign their names with the appearer and me, the said notary, the day and date aforesaid.

(Signed) A. J. GOMILA.
(Signed) ANDREW HERO, JR., *Not. Pub.*

(Signed) JNO. J. WARD.
" S. THERIOT, JR.

A true copy of the original act on file and of record in my office. New Orleans, July 17, 1883.

(Signed) ANDREW HERO, JR., *Not. Pub.*

Gomila No. 6.

NEW ORLEANS, *June* 29, 1883.

Messrs. E. Forestier & Co. bought of Gomila & Co., general produce commission merchants, 100 Magazine street.

40 To S. S. Deronda, ex barge 46, 52,140.5 bus. corn, at 60 cts. ---------- $31,284 05

Gomila No. 7.

NEW ORLEANS, *June* 30, 1883.

Messrs. E. Forestier & Co. bought of Gomila & Co.

Ex barge 30, to S. S. Deronda, 30,447.53 bus. corn, at 60 cts. ---------- $18,268.76

Gomila No. 8.

NEW ORLEANS, *June* 30, 1883.

Messrs. E. Forestier & Co. to Gomila & Co.

Difference in freight, 82,588$\frac{2}{5}$ bus.. 9635–130, or, at 3*d.*, £120.8.10, at $4.80 ---------- $578.12

Gomila No. 9.

NEW ORLEANS, *July* 5, 1883.

Messrs. Gomila & Co., New Orleans.

DEAR SIRS: Referring to our respects of the 30th ulto., we beg to say that our buyers in Copenhagen have finally refused the cargo of the Deronda on account of the deficiency in quantity.

We have endeavored to make the owners of the Deronda take the cargo at the price we sold, but, they refusing, and, besides, being about to tamper with the cargo, so that insurance is cancelled, we are compelled to return you the documents with the request
41 that you will send us check for the amount of our loss, as customary in such cases.

We remain, dear sirs, yours very truly,

E. FORESTIER & CO.

Document Marked Bangston 1.

Seller's copy. Grain contract.

Bought from Gomila & Co. by E. Forestier & Co., at the price of 60 cts. (sixty cents) per bushel of 56 pounds, on board seller's vessel, with freight at 6 (six) shillings per quarter, and to be shipped from New Orleans during the month of June, not later than the 30th (midnight), seller's option, a cargo of not over 12,000 and not under 10,000 quarters (480 lbs.) of No. 2 mixed corn of the standard of New Orleans inspection.

Destination, Elsinore, for orders to Copenhagen or Aarhons.

Forms.—Any difference in freight for account of seller; cash on delivery of documents.

New Orleans, June 7th, 1883.

(Signed) GOMILA & CO.

Bangston No. 2.

No. 5313. NEW ORLEANS, *July* 17, 1883.

Union National Bank pay to the order of Messrs E. Forestier & Co. thirty one hundred and ninety-four $\frac{29}{100}$ — ($3,194.29).

GOMILA & CO.

Endorsed: For deposit, pro E. Forestier & Co. (Signed) Ch's L. Gabici.

42 Bangston 3 is charter party, page 30 Bis.

Bangston No. 4.

NEW ORLEANS, *July 14th*, 1883.

Mr. E. Forestier bought of J. B. Camors & Co., per S. S. Deronda.

82,588 bus. mix. corn, at 49.06	38,816	36
31,214 bus. mix. corn, at 52 cts.	1,625	65
	40,442	01

Bangston No. 5.

No. 1393. NEW ORLEANS, *July* 16, 1883.

Union National Bank pay to the order of Messrs. J. B. Camors & Co. forty thousand four hundred and forty-two $\frac{1}{100}$ dollars.

$40,442.01. P. p'r E. FORESTIER & CO.,

(Signed) CH'S L. GABICI.

Endorsed: (Signed) J. B. Camors & Co.

Bangston No. 6. *Exchange Contract.*

NEW ORLEANS, *June* 5, '83.

Sold to Union National Bank for account E. Forestier & Co., exchange against $50, 60,000 bales cotton on E. J. Hambro &
43 Sons, London, b. la., sight draft, all June delivery; rate, $4.87\frac{3}{4}-\frac{1}{8}$.

(Signed) BORTUS & DUREL.

Bangston No. 7.

Via England, Storkebye — Hiralsoe.

Telegraph address, Stockebye & Co., lock box 2915.

COPENHAGEN, 6*th June*, 1883.

Messrs. E. Forestier, New Orleans, N. America.

DEAR SIRS: We wrote you on the 4th inst. and received y'day your wire:

Galepots, Fatimite, Fattiness, Myrtlewax, Rayonnant, Sherbet, Oliraster, Catarrh, or Cancers, Scabious, Innatire, Hambro, Irishmen, reading—

Your order impracticable, but have bought to your account, subject to cable confirmation here to-morrow on or before 9 a. m., 10–12,000 qrs. No. 2 mixed corn by steamer, at 28–1½ d. c. of shipment in June to Copenhagen or Arrhons, American terms; payment, draft at sight, less 60 days' discount, at 4% p. a. on E. J. Hambro & Sons, London; cable at all events.

To which we have replied: Feignedly, Sheildness—saying:

Your purchase is confirmed; mixed corn, sail grade, by steamer, and consequently we confirm having bought of you 10 to 12,000 qrs. No. 2 mixed corn, codificated sail grade, at 28 sh. 1½ d. p. 480 lbs. c. If by steamer to Copenhagen or Arrhons, shipment in this month, payment against documents by draft at sight on E. J. Hambro
44 & Sons, London, less 60 days' discount, at 4% pro anna., otherwise American terms; the steamer to call here at Frederickhaven or Elsinore for final destination, and are now awaiting your written confirmation. We are pleased to have come to business with you. In this case we have given you the preference for other offers at exactly the same price and conditions in order to test

your shipments, and you will understand that the turn out of this first transaction is of the greatest consequence to future transactions. We have already this season had several big steamer cargoes of maize from your port, and we have been extremely pleased with the promptness of shipment and the excellent discharge here; the same we must experience from you if you wish to secure our orders.

We have now your wire: Firelock, Shieldless, Abbwool, Lustily, Guayamon, Olirine, Everything, Scrubbling, Misquoted Myrtlewax, reading—

Sale is confirmed, sail grade, by steamer; market for breadstuffs firm and rising; freight higher.

We offer you hereby from 10–12,000 qrs. No. 2 mixed corn, sail grade, by steamer at 284½ c., if shipment in 2nd half of June or 1st half of July to Copenhagen or Aarhons; other conditions as in our wire of the 4th against reply there to-morrow by 9 a. m., for which offer we are much obliged, and shall now see what may be done with it.

Yours truly,
(Signed) STOCKEBYE.

Endorsed: Rec. June 22. Answered June 30.

45 *Bangston No.* 8. *Cable Message.*

COPENHAGEN, *July* 2, 1883.

To Forestier, N. Orleans:

Refuse deponda.
(Signed) STOCKEBYE.

Bangston No. 9. *Cable.*

COPENHAGEN, *July* 3, 1883.

To E. Forestier, New Orleans:

Revestiary Deronda, oily grain iriscope.

——— ———.

Bangston No. 10. *Statement.*

Due by Messrs. Gomila & Co. to E. Forestier & Co. for non-fulfillment of sale of June 6, 1883, 10,000 qrs. No. 2 mixed corn, at 281½*d.* pr. qr.:

Cost freight and insurance	£14,062
Less freight, $\frac{5}{9}$ per qr.	2,875
	£11,187

£11,187, at exchange, 4.87$\frac{3}{4}$		$54,564 60
Harbor risk on $55,700, $\frac{5}{8}$%		348 12
Diffi. in exchange on 54,564.60, $\frac{1}{2}$%		272 82
Cable expenses		80 00
		$55,265 64
10,000 qrs. No. 2 mixed corn, 85,714.$\frac{2}{100}$ bus.. @ 60$\frac{3}{4}$ cts.		52,071 25
		$3,194 29

E. E.
New Orleans, June 30, 1883.

46 Bangston No. 11 is the same document as Gomila No. 9, already copied at page 40, &c.

Bangston No. 12.

Telegrams exchanged between E. Forestier & Co. & M.

NEW ORLEANS, *July* —, 1883.

Received.	Sent.
	30th ulto
Deronda	
Rickcloth	we have shipped
Quadririum	9600
Quarters	quarters
Residinons	reply if in order or not
Reresolved	what do you propose
Iriscope	cable at once
2nd inst	
Featherbed	at what can you buy
Deronda	
Iriscope	cable at once
Searchable	use all possible exertions
Securely	make arrangements
3d	
Galium	your offer impracticable the lowest we
47 Olecranal	could ship at is 26
Fereroot	buyers there at
Giri	
You	
Preference	
Iriscope	cable at once
9th	
Feareth	can possibly buy
Deronda	
Olecranal	at 26
10.	
Deronda	
Inacuso	mixed corn sail grade at 26

Received.		Sent.
	Myrtlewax	reply here to-morrow on or before 9 a. m. 11th
	Deronda	
	Firelock	your sale is confirmed
	Olecranal	at 26
	Sheildless	mixed corn sail grade
	Revisory	we will draw
	Hairlace	E. J. Hambro & Son
	Advise	
	Them	
	Guadimice offer	10–12000 qrs. mixed corn sail grade by stmr at 27—cif
48	Conolega	offer 10–12000 qrs. No. 2 red winter wheat by steamer at 45 cif.
	Catchers	shipt July August Elsinore
	Orders	for orders
	Copenhagen	to Copenhagen
	Or or	
	Aarhuns	Arhuns
	Galistone	make best counter offer if limit unattainable 12th
	Feareth	can possibly buy
	Oleoresin	at 26–6
	Scrotocile	give discretion
	From from	
	Quadrune	10000
	To to	
	Quailed	15000
	Eranunious	July Aug. Sept shipmt
	Irishism	cable at all events
	Abnegation	market hardening prices and more doing 16th
	Falcated	shipped on the Deronda
	Putomen	500 qrs.
	More	
	Flanco	quotation mixed corn 27
	Amends	expect prices to improve
49	18th	
	Derond	
	Outrivaled	£10,000
	Macopud	vessel sailed on the
	Mistful	18th July
	Levitens	according to British Lloyds 2% 20
	Roundabout	we have not confirmed
	Misspent	2d July
	Deronda	
	Was sailing	was sailing
	Resale	resale

Received.	Sent.
	Olecranal at 261
	Mistaking 10th July
	Mistaught 11th
	Was made was made
	Without without
	Description description
	Floating floating
	Rollerbut you must accept
	Intrepidly shall hold you responsible for non-payment of draft
	Documents documents
	Quadrivium 9600 qrs.
	Dated dated
50	Missound June 30th
	Delay / Sailing / Caused — delay sailing caused
	By unloadig / Reloading portion — by unloading reloading po. ion cargo
	Roll call you must
	Hold steamer responsible damages detention cargo perfect condition hold steamer responsible damages detention cargo in perfect condition.
	Scolds if convenient
	Ringousel we can arrange
	Probably probably
	Insurance insurance
	Antwerp at Antwerp
	Conditions conditions
	Scathly buyers option
	20th July
	Stockebye
	Soulerant raising
	Difficulties difficulties
	Deronda
	Conseillons advise
	gue that you
	Partiviz proceed
	immediatement immediately to
51	Copenhagen
	Perisable we will explain
	quand when
	vous serez you shall
	arrive arrive there
	royez see
	Lund lund
	26th inst
	Inumbrate have remitted by cable
	Outpoured £1,500
	28th
	Saccharitz agree to terms proposed

Bangston No. 13. *Cable.*

COPENHAGEN, *July* 26, 1883.

To Forestier, N. O.:

Negotiating irregular room some immediately Hambro iodurat outpoured.

(Signed) FORESTIER.

Bangston No. 14. *Cable*

COPENHAGEN, *July* 26, 1883.

To Forestier, New Orleans:

Any case room some immediately Hambro my credit to dure outpoured.

(Signed) FORESTIER.

Bangston No. 15. *Cable.*

52 COPENHAGEN, *July* 20, 1883.

To Forestier:

Rhomboid Deronda quadririum floating seribes missprint rudolphine if only macropod mistful.

(Signed) STOCKEBYE.

Bangston No. 16. *Cable.*

COPENHAGEN, *July* 4, 1883.

To Forestier, N. O.:

Gunlet Oclygram Iriscope.

(Signed) STOCKEBYE.

Bangston No. 17. *Cable.*

COPENHAGEN, *July* 18*th*, 1883.

To Forestier, N. O.:

Iodism Deronda wire invoice amount congarmed.

(Signed) STOCKEBYE.

Bangston No. 18, 1883. *Cable.*

COPENHAGEN, 20 *July*, 1883.

To Forestier, N. O.:

Irrelative misthrow Stockebye Rosemallow perhaps resolving if clean Blading you remitting Hambros obquirmate allowance intende otherwise consignment Copenhagen necessary remitting outpoured margin romekin immediately, have steamer any claim, how many days left Vora.

53 *Bangston No.* 19.

Exchange contract.

NEW ORLEANS, *July* 11, 1883.

Sold to Union Bank, for acct. of E. Forestier & Co., exchange against ab't £9,000 on Hambro & Son, sight; B. la. rate, 487⅛.

(Signed) BERTUS & DUREL.

Bangston No. 20.

Letter from Stockebye & St. Valsoe to Forestier & Co.

COPENHAGEN, *the* 12 *July*, 1883.

Messrs. E. Forestier & Co., New Orleans.

DEAR SIRS: We wrote and wired you yesterday, and have now your wire, "Deronda firelock olecrana, shieldless, perisory haielace advise them guadameco congolega, catehers, orders Copenhagen or a Aarhons gallstone," thereby informing us that the sale to us of the cargo of sail maize pr. Deronda is in order, at 26 sh. of 480 lbs. cif, and further offering by steamer 10–12,000 quarters No. 2 mixed sail maize, at 27, or No. 2 red winter wheat, at 45 cif, to Copenhagen or Aarhons; Elsinore for orders; shipment in July and in August, for which offers we are obliged, but the prices are above what we can afford to pay. However, we are seeing what can be done and hope to wire you a good counter offer in course of to-day.

Awaiting the invoice of Deronda, we have instructed Messrs Hambro & Son, and remain

Yours truly,

(Signed) STOCKEBYE & HYRALSOE.

Bangston No. 21.

54 Stokkebye & Hyralsoe to E. Forestier & Co.

COPENHAGEN, *the* 17*th July*, 1883.

Messrs. E. Forestier & Co., lock box 2915, New Orleans, N. America.

DEAR SIRS: Confirming our respects of the 13th inst., we have now your wire, Folcated Deronda Putomen more flanco amends, reading:

We have shipped on board the Deronda 500 qrs. maize more, for which we quote 27 cif, expecting prices to improve, which communication we do not understand, as we suppose the steamer Deronda has left your port already a fortnight ago, and how can you now have shipped 500 qrs. more? However, we expect now your invoice, which no doubt will explain matters.

At the price of 27 sh. there is nothing to be done in maize here. We bought y'day a steamer cargo of ab't 8,000 qrs. for shipment within a month from Montreal, at 25–7–½ cif., to Copenhagen or Aarhons.

Yours truly,
(Signed) STOKKEBYE & H. VALSOE.

Bangston No. 22.

Forestier & Co. to Stokkebye & Hralsoe.

NEW ORLEANS, *June* 5, 1883.

Messrs. Stokkebye & Hralsoe, Copenhagen.

DEAR SIRS: We beg to confirm you our letter of 6th ulto.
55 Referring to enclosed copy of cables exchanged, we have sold you a cargo of 10,000 to 12,000 qrs. No. 2 mixed corn, sail grade, at 28–1½ per 480 lbs., cost freight and insurance; shipment this month per steamer for Copenhagen or Aarhons, your option; port of destination to be given when requested before the signature of bill of lading; other usual American terms; payment in our draft at sight on Messrs. E. J. Hambro & Son, London, less 60 days' interest, at 4% per annum, against remittance of documents.

As we telegraphed you yesterday night, your limit of 27–9 was out of question, and as we were just in position to close at 28–1½ we did it, hoping that this price, which is very low, would suit you, and we are very glad to see that you appreciated our doings.

Our commission is rather small, but we calculate on a very modest benefit in view to make a start, hoping thus that business between us will be henceforth more active and profitable to us all.

As we intend to write in a few days to M. M. C. J. Hambro & Son on purpose to inform them about our drawing on them for your account, please be kind enough to inform them about this matter.

There have been some complaints about the new corn plant, but we believe that the damage does not amount to much.

However, our opinion is that corn is not to go down much, and a fall of 2 cents a bushel will bring many European buyers in the market, and thus put up prices again.

About wheat, our prices for No. 2 St. Louis are out of question for export, and we have to await until the new crop comes on the market, and even then we do not believe in very low figures, owing to real damages done to the winter wheat crop. The spring
56 wheat looks first rate.

We remain, dear sirs, &c.,
(Signed) E. FORESTIER & CO.

Bangston No. 23.

NEW ORLEANS, *July* 5.

Messrs. De Wolf & Hammond, agents for the owners of the Eng'h S. S. Deronda.

GENTLEMEN: Hearing that you are talking of unloading a portion of the 170 tons coal now on S. S. Deronda, we notify you that we positively object to and protest against the removal or diminution of said fuel. That quantity, 170 tons, was determined by the master to be necessary and it is barely sufficient for the safe voyage of said steamer, and the further loading of cargo was stopped by the official order of the inspector.

We further protest against the emptying of the boilers of said steamer and demand that they be pumped up to their full capacity.

Respectfully, —— ——.

Bangston No. 24.

NEW ORLEANS, *June 30th*, '3.

Messrs. Gomila & Co.

DEAR SIRS: We are just informed this p. m. that the S. S. Deronda has completed the loading of her cargo of corn. The quantity taken by her is $82{,}588\frac{2}{5}\frac{2}{6}$ bus.

Upon your guarantee that this steamer would carry not less
57 than 10,000 quarters we sold the same in Europe.

As she does not take the required quantity the cargo will surely be refused, in which event we hold you responsible for all damage, loss, or claim arising from said refusal.

Yours very truly,

(Signed) E. FORESTIER & CO.

Bangston No. 25.

NEW ORLEANS, *July 5th.*

Mess. De Wolf & Hammond, agents for the Eng. S. S. Deronda.

GENTLEMEN: We confirm our letter of this morning.

Upon visiting the S. S. Deronda this evening about 4 p. m., in company with Capt. Baker and Mr. Torrey, we were surprised to see that the mate and crew and a stevedore employed by the officers of the vessel were illegally and improperly shifting the cargo and bulking it between decks, contrary to the rules of the underwriters and customs of the port and directly against the orders and directions of the marine inspector.

We most emphatically protest and warn you as the agents of the owners against this and all other illegal and improper action concerning said cargo.

Heavy damages have already arisen in this matter and are hourly increasing, for which we look to and will hold the said vessel and her owners.

Very respectfully,

(Signed) E. FORESTIER & CO.

58 *Bangston No.* 26.

NEW ORL'S, 12 *July*, '83.

Mess. De Wolf & Hammond.

GENTLEMEN: The S. S. Deronda finished restoring her cargo last evening under the inspection of Capt. Baker and myself, and is now ready to complete her loading. You will please let us know when she will commence taking in the remainder of her cargo, and we think will take about 100 tons more.

THOS. CONWAY.

We hereby certify this to be a true copy of the original in our possession.

DE WOLF & HAMMOND,
Ag'ts S. S. Deronda.

Bangston No. 27.

NEW ORL'S, 6 *July*, 1883.

Messr. Gomila & Co. and E. Forestier & Co., charterers and transferees of the S. S. Deronda.

GENTLEMEN: By notice from Mess. Gomila & Co. of yesterday's date we are informed that you have advertised for sale at auction the cargo of the S. S. Deronda and privilege of charter party. You fail to assign any reason in your notice for so doing, and we are not aware that any legal reason exists therefor, and therefore protest against it so far as any loss or damage may result to the said steamship and our owners.

We are advised, however, that lien on the cargo is full protection for their freight, demurrage, &c., and therefore they have no
59 concern with any attempted transfer of title by auction or other illegal proceedings. Two notes from Mess. E. Forestier & Co. of yesterday's date inform us that you object to our unloading a portion of the 170 tons of coal now on the S. S. Deronda and against emptying the boilers and against shifting the cargo and bulking it between decks, &c., &c.

In reply to these and similar charges in those two last-mentioned notes we beg to say that the S. S. Deronda has laden on board 170 tons coal, which was the quantity, about, required to take her from this port to Sydney, but that 95 to 100 tons will be ample to take her to Newport News, where she can take on coal again, and, as the charter party in express terms declares "steamer to have liberty to call at any ports for coal or other supplies," we choose to exercise that right, and will take out such quantity of coal as will, with other spaces in the vessel, enable us readily to receive and carry the remaining quantity of grain necessary to complete the shipment of the 10,000 quarters, and this we hereby notify we can do and are preparing to do without emptying the boilers, without shifting the cargo (excepting the temporary removal of a small portion in order to get at the coal bunker, and the portion so removed shall be carefully re-

placed), without bulking the cargo between decks, and without in any manner violating the rules of underwriters and custom of the port, &c.

By the removal of a comparatively small proportion of the coal not necessary to the voyage, as we have shown above, and by calling at Newport News, this steamer can readily and easily carry the 10,000 quarters stipulated, and we now and hereby notify you and whom it may concern that the preparations necessary are being properly made and that the said steamer will, on Saturday, July 7th, 1883, at 10 o'clock a. m., be prepared and in readiness to
60 receive on board for shipment the balance of her said cargo sufficient to make said shipment of grain up to 10,000 quarters, as per charter party; and on behalf of said steamship and owners we do now and hereby protest against any other course or proceeding threatened by you to be taken, hereby demanding that you proceed promptly to furnish the balance of said grain for shipment, as per said charter party, and in default of you so doing that said steamship and owners will look to you for any and all loss and damages they may sustain in the premises.

Very respectfully, DE WOLF & HAMMOND,
Ag'ts for the S. S. Deronda.

Bangston No. 28.

E. Forestier & Co. to Messrs. Stockkebye & Hralsoe, Copenhagen.

DEAR SIRS: We beg to confirm our letter of the 20 ulto., and are in possession of your favors of the 18, 19, 22, & 23 do.

Telegrams.—Referring to enclosed copy you will have seen that on the 21st ulto. we finally succeeded in getting the option of Elsinore for orders to discharge at Copenhagen or Aarhons, but you must know that we had to pay for it.

We speak of this only for memory's sake. As this steamer did not take the quantity she ought to we were bound—not being thus in the conditions of our contract with you—to ask you whether you were willing to accept or not the cargo, as it was asking you to make us a proposition.

The final result of all propositions is that, cancelling the first contract, we resold you the Deronda at 26 cif, Elsinore
61 for orders to Copenhagen or Aarhons, and all other conditions, as per our letter of June 5th.

We beg to hand you enclosed our invoice, amounting to £9,691. 11.7, value at sight, on our draft on M. M. C. J. Hambro & Son, London, against documents, as per our letter to them and of which please find copy herein.

We have to state to you that as this steamer made some more room to carry out her engagement there will probably be about 500 qrs. more, which, we trust, you will undoubtedly take.

As soon as we will know the quantity and have all the documents we will send you the invoice and draw on C. J. Hambro & Son, to whom please give notice.

As this transaction is a very bad one for us and on which we make a big loss we hope you will try to let us make as much business as possible and give us liberal limits to work on.

We telegraph you to-day that we could probably sell #2 mixed corn, sail grade, at 26.6 cif, usual conditions, asking you to give us the privilege of a steamer of 10,000 or 15,000 qrs. and shipment July, August, and September.

No. 2 red winter wheat is worth 45 cif, July, August, Sept. shipment.

The quality will be good, and as soon as we can we will send you a standard.

We remain, dear sirs, yours very truly,

(Sig.) E. FORESTIER & CO.

P. S.—We note once for all that you like to have your cargoes divided in bill lading of 2,000 qrs. each, and that unless the contrary is stipulated the vessels have to call to Elsinore for
62 orders to discharge at Copenhagen or Aarhons.

The marine insurance of this shipment (Deronda) was made out on the basis of 28–1½, the original price.

Enclosed please find the certificate of the N. O. Ins. Co., in duplicate, for the difference between 28–1½ & 26—say $5,175—which you please hold for our account in all events.

Bangston No. 29.

Letter from Forestier & Co. to Stokkebye & Hralsoe.

NEW ORLEANS, *July* 16*th*, 1883.

Mess. Stokkebye & Hralsoe, Copenhagen.

DEAR SIRS: We confirm our letter of the 12th instant, copy of which herewith, and have the honor to hand you invoice of 3,126$\frac{4}{8}$ bushels No. 2 mixed corn, sail grade, by S. S. Deronda, which completes her cargo.

This invoice amounts to £366.17.3, for which we have drawn on at sight upon M. M. C. J. Hambro & Son, London, our draft, $1,399, against remittance of the documents, as per our letter of advice to them, of which please find copy herein.

Telegrams.—Enclosed please find — of our to-day's cable advising you of the above shipment & quoting mixed corn 27, which we confirm, and remain, dear sirs,

Yours very truly,

(Sig.) E. FORESTIER & CO.

The tone of our markets is decidedly better.

63 *Bangston No.* 30.

COPENHAGEN, *July* 10, 1883.

To Forestier, N. O.:
Fuscite Deronda Aldiverer.

STOKKEBYE.

Bangston No. 31.

COPENHAGEN, *July* 11, 1883.

To Forestier, N. O.:
Accept Deronda Shieldless.

STOKKEBYE.

Bangston No. 32.

Comparison of 10,000 quarters sold at 28*s.* 1½*d.* and at 26 per quarter:

10,000 quarters, at 28–1½	£14,062 10 0
10,000 " " 26	"13,000
	£1,062 10 0
At the exchange of 4.87½	$5,179 69

E. E.
New Orleans, December 8, 1883.

Document Marked C No. 1.

Letter from De Wolf & Hammond to Gomila & Co.

NEW ORL'S, 12 *July*, 1883.

Mess. Gomila & Co., city.

DEAR SIRS: In reply to your letter of the 11th inst., we beg
64 to say that the charter party made on the 19th inst. with you as charterers was, at the request of your Mr. Gomila, cancelled and all copies destroyed and a new charter party made to Mess. E. Forestier & Co.

(Sig.) DE WOLF & HAMMOND,
Ag'ts S. S. Deronda.

N. B.—The letter marked C No. 2, from E. Forestier & Co. to De Wolf & Hammand, of 5 July, '83, and the letter from De Wolf & Hammond to Gomila & Co. & E. Forestier & Co., charterers & transferees, of July *C*, '83, marked C 4, are already copied at pages 56 to 58.

Copies of Cables Passed Between Messrs. —— and De Wolf & Hammond, New Orleans.

Copy of cable messages sent about the S. S. Deronda by De Wolf & Hammond.

Date.	Code word.	Interpretation.
1883.		
		Deronda
June 16	Acopie	Are offered
	Triturable	5 | 6
	Liverpool	Copenhagen Aarhons call at Elsinore for orders
	Misswear	She must be guaranteed to carry not less than 10,000 quarters
	Murmingear	
	Recusation	Charterers to have option of cancelling C | P if ship is not ready to receive cargo by 25 June
June	—	Sent to W. J. Hammond Liverpool
65		
18	Misread	Deronda's captain's opinion she can carry 10,000 quarters
		Coaling Sydney
	Bedote	Have closed as follows subject to owners' approval
	Triture	5 | 9
	Liverpool	Calling at Elsinore for orders
		Copenhagen Aarhons
	Superarit	Charterers' option
	Shrunken	To Cork or Falmouth for orders to discharge at a safe port in U. K. or Continent between Bordeaux & Hamburg both inclusive. If ordered to Continent from port of call 10 per cent additional if ordered direct to U. K. 3d off, if ordered direct to Continent rate to be same as C f O not 10 per cent. additional
	Tritorium	5 | 3
		Guaranteeing
	Murmegear	10,000 quarters
		Sent W. J. Hammond Liverp'l
June 19		Deronda closed
		Sent W. J. Hammond Liverp'l
30		Deronda loaded carries 9,635 quarters, cargo sold not less than 10,000; quarters Copenhagen value twenty-five,
66		Buyers refuse acceptance, as cargo falls short
		Charterers hold ship responsible
		Sent Culliford & Clark Sunderland
July 2		Shippers trying resell cargo
		Sent Culliford & Clark Sunderland
2		Charterers intend selling cargo auction to-morrow attaching vessel difference else owner take cargo original price including balance.
	Murmegear	10,000 quarters
		Sent Culliford & Clark Sunderland
July 3		Cargo on board
	Monadic	2,000 tons
	Moldira	65 tons
		Maize
	Molienda	170 tons
		Coal surveyors refuse load deeper ship full all over, no advantage
		Newport cargo sold
	Romero	June loading
		Shippers can sell Copenhagen

Copies of Cables Passed Between Messrs. ——, &c.—Continued.

Date.	Code word.	Interpretation.
1883.		
	Tropology	25 |
		You paying difference or owners buy cargo twenty-eight three C J f best can do which do you advise cargo maize no two mixed, sail grade very good
67	Topic	May draw on you for same
		Sent Culliford & Clark Sunderland
July 4		McConnell consulted trying arrange
		Sent Culliford & Clark Sunderland
July 5		Under legal advice discharging sufficient coal make room cargo, which shippers refuse, they advertised sale cargo 7th with privilege charter party, say they will attach for difference, must coal Newport, Sydney and Cork
		Sent Culliford & Clark Sunderland
July 9		Cargo sold ship seized for $25,000 difference price corn. Bond for $32,000 required from owners by the court; name bankers here to furnish bond.
		Sent Culliford & Clark Sunderland
13		Deronda
	Selectness	Have finished loading
	Murmeyear	10,000 quarters
		Destination Elsinore
	Vinegar	We expect her to sail about Monday delayed taking evidence McConnell demands retaining fee
	Vacantly	$1,500
68		Reply
		Sent Culliford & Clark Sunderland
July 15		McConnell insists payment
	Vacantly	$1,500
		Before sailing
		Sent Culliford & Clark Sunderland
July 15		McConnell cabled Adamson
		Sent Culliford & Clark Sunderland
17		Shall we pay McConnell
	Vacantly	$1,500
		Sent Culliford & Clark Sunderland
July 17	Sayings	Sailed Wednesday one to 6 a. m.
		Sent Culliford & Clark Sunderland
25		Deronda's charterers ask
	Serrated	Liberty orders at coaling port
	Simplist	Calling at Cork for orders
		Also wanting privilege Cork to Elsinore
	Conducible	What do you propose sent Culliford & Clark Sunderland at the request of E. Forestier & Co.
July 28		Too late
		Sent Culliford & Clark Sunderland

Copy of Telegram Sent from Culliford, London, to Culliford & Clark, Liverpool.

JUNE 18.

Fix Deronda five six pence Aarhons guaranteeing 10,000 quarters provided captain agrees this quantity no doubt Orleans now
69 quite due, must have lighterage merchants' risk expense and think Hammond should try fial nine pence, just leaving for Sunderland.

Copies of Letters Passed Between Messrs. —— and De Wolf & Hammond, New Orleans.

Telegrams received about chartering S. S. Deronda.

Date.	Cable word.	Interpretation.
June 18		Fix Deronda
	Triturable	5 | 6
		Aarhons guaranteed
	Murmegear	10,000 quarters
		Provided captain agrees quantity
	Impulsor	Lighterage at charterers' risk and expense
		Try
	Triture	5 | 9
June 19		Fix Deronda, after hard work got Culliford &
	Cellular	Owners accept your offer but
	Spaniel	You must exclude Rouen cannot go there
		From W. J. Hammond, Liverpool
July 1		Complete swindle captain knows ship discharged 10,380
		Bordeaux
70		Compromise pay value grain from
		Culliford & Clark Sunderland
July 3		Quantity stated means 1,900 tons, ship carries 2,350, discharge sell overplus bunkers, do protect our interest from Culliford & Clark Sunderland
July 3		Must discharge bunkers load balance grain coal Newport if necessary
		From Culliford & Clark Sunderland
July 4		Consult indemnity
		Lawyer McConnell, if he approves dispatch Deronda, give bail if necessary, first telegram simply meant paying difference value alleged short shipment save delay
		From Culliford & Clark Sunderland
July 5	Separatist	Why the delay
	Warfare	Give bonds get ship away
71		From Culliford & Clark Sunderland
July 12		Bail given by Barings
	Vilipond	Dispatch her as quickly as possible
		From Culliford & Clark London
July 16	Zebra	Arrange with McConnell
	Trepante	Take care to protect us
		Indemnity
	Warmly	Have given the required security
		From Culliford & Clark Sunderland
July 17		Yes under protest get ship away
	Editor	The delay is most serious, wire what is doing
		From Culliford & Clark Sunderland
July 28		Anxious oblige
	Condenado	What are shippers' views
		From Culliford & Clark Sunderland

Fix Deronda five six pence Aarhons, guaranteeing 10,000 quarters provided captain agrees this quantity; no doubt Orleans
72 now quite due; must have lighterage merchants' risk expense, and think Hammond should try five nine pence; just leaving for Sunderland. Sent to Culliford & Clark, Liverpool, from Culliford, London, June 18, 1883.

Copy of Telegrams Sent Respecting the Chartering of the S. S. Deronda.

JUNE 16.

To W. J. Hammond, Liverpool:

Deronda are offered 5–6 Copenhagen Aarhons, coaling at Elsinore for orders. She must be guaranteed to carry not less than 10,000 quarters, charterers to have power of cancelling charter party if vessel is not ready to load cargo by 25 June.

(Sig.) DE WOLF & HAMMOND.

JUNE 18.

To W. I. Hammond, Liverpool:

Deronda captain's opinion she can carry 10,000 quarters, coaling Sidney. Have closed as follows, subject to owners' approval: 5*s.* 9*d.*, calling at Elsinore for orders; Copenhagen Aarhons, charterers' option, Cork or Falmouth for orders, 5*s.* 3*d.*; to discharge at a safe port in U. K. or Continent, Bordeaux to Hamburg, if ordered to U. K. direct, 3*d.* off; if ordered to Continent from port of call, 10 per cent. additional.

(Sig.) DE WOLF & HAMMOND.

JUNE 30.

To Culliford & Clark, Sunderland:

Deronda loaded; carries 9,635 quarters; cargoes sold not less than 10,000 quarters Copenhagen, 28–3; present value, twenty-five. Buyers refuse acceptance, as cargo falls short. Charterers hold 73 ship responsible. Advise.

(Sig.) DE WOLF & HAMMOND.

JULY 3.

To Culliford & Clark, Sunderland:

Cargo on board, 2,065 tons maize, 170 tons coal. Surveyor refuse load deeper; ship full all over. No advantage Newport. Cargo sold June. Loading shippers can sell Copenhagen 25*s.*, you paying difference, or owners buy cargo 28*s.* 3*d.* C. If best can do, which do you advise? Cargo maize, No. 2 mixed sail; grade very good. May we draw on you for same?

(Sig.) DE WOLF & HAMMOND.

JULY 4.

To Culliford & Clark, Sunderland:

McConnell consulted; trying arrange.

(Sig.) DE WOLF & HAMMOND.

JULY 5.

Under legal advice, discharging sufficient coal make room cargo, which shippers refuse. They advertise sale cargo 7th, with privilege. Charter party say they will attach for difference, most Newport, Sidney, & Cork.

(Sig.) DE WOLF & HAMMOND.

JULY 9.

To Culliford & Clark, Sunderland:

Cargo sold. Ship seized for $25,000, difference price corn. Bond for $32,000 required from owners by the court. Name Canker here to furnish bond.

(Sig.) DE WOLF & HAMMOND.

JULY 13.

Sent Culliford & Clark:

Have finished loading 10,000 quarters; destination Elsinore, to sail about Monday; delayed taking evidence. McConnell demands retainer fee $1,500. Reply.

74

(Sig.) DE WOLF & HAMMOND.

JULY 15.

Sent Culliford & Clark:

McConnell insists payment of $1,500 before sailing.

JULY 15.

Sent Culliford & Clark:

McConnell cabled Adamson.

JULY 17.

Sent Culliford & Clark:

Shall we pay McConnell $1,500?

JULY 17.

Sent Culliford & Clark:

Sailed one to 6 a. m.

JULY 21.

Sent Culliford & Clark:

Your letter of 5th received. You are mistaken; better await our letter of 18 and study document before accusing wrongly; also refer your serious telegram 5 from London, June 18, to Liverpool house about guarantee.

25 JULY.

Sent Culliford & Clark:

Deronda charterers ask liberty orders at coaling port, calling at Cork for orders; also wanting privilege Cork to Elsinore. What do you propose?

Telegrams Received About the S. S. Deronda by De Wolf & Hammond

JUNE 18.

Fix Deronda 5*s.* 6*d.*, Aarhous; guarantee 10,000 quarters, provided captain agrees quantity lighterage at charterers' risk and expense; try 5*s.* 9*d.*

(Sig.) J. W. HAMMOND.

75

JUNE 19.

Fix Deronda after hard work if Culliford, owner, accept your offer; but you must exclude Rouen; cannot go there.

W. J. HAMMOND.

JULY 1.

Complete swindle; Capt. knows ship discharging 10,380 Bordeaux; compromise; pay value grain.

(Sig.) CULLIFORD & CLARK.

JULY 3.

Quantity stated means 1,900 tons; ship carries 2,350; discharge; sell overplus bunkers; do protect our interest.

(Sig.) CULLIFORD & CLARK.

JULY 3.

Must discharge bunkers; load balance grain; coal Newport if necessary.

(Sig.) CULLIFORD & CLARK.

JULY 4.

Consult indemnity lawyer, McConnell; if he approves dispatch Deronda; give bail if necessary; first telegram simply means paying difference value alleged short shipment; save delay.

(Sig.) CULLIFORD & CLARK.

JULY 5.

Why the delay? Give bond and get ship away.

(Sig.) CULLIFORD & CLARK.

76

JULY 12.

Bail given by Barings; dispatch her as quickly as possible.

CULLIFORD & CLARK.

JULY 16.

Arrange with McConnell; take care and protect us indemnity; have given the required security.

CULLIFORD & CLARK.

JULY 17.

Yes, under protest; get ship away without delay; is most serious.

CULLIFORD & CLARK.

JULY 28.

Anxious oblige; what are shippers views?

CULLIFORD & CLARK.

Bill of A. Neeb, Stevedoring.

NEW ORL'S, *June* 30, '83.

Mess. Gomila & Co. to A. Neeb, Dr.

S. S. Deronda to trimming 67,001 bus. corn, 1.25	83 75
To sacking and sewing 15,586 i. c. ¾	116 88
To stowing 5,785 sacks	130 16
To extra labor, night work	21 30
	352 09

Certificate of Inspection.

77 STATE OF LOUISIANA, PORT OF NEW ORLEANS,
SURVEYOR'S OFFICE, 67 & 69 CAMP ST.

The undersigned, inspectors for underwriters of New Orleans & general marine & river surveyors for the inspection of vessels, steamers, and cargoes:

This is to certify that the British S. S. Deronda, Capt. Eldridge, was loaded under the inspection of Capt. W. M. Baker and finished loading to the marks given by him on June 30th, 1883, and certificates in triplicate given on that date in due form, since which time the cargo has been partly broken out and restowed and the ship lightened by discharge of coal and water from water-ballast tanks.

The ship completed her loading this day; has now on board 67,406$\frac{4}{5}\frac{9}{6}$ bushels of corn in bulk and 18,307$\frac{1}{5}\frac{6}{6}$ — in 6,914 sacks, making total 85,714$\frac{1}{5}\frac{6}{6}$ bushels.

The ship is now properly loaded according to the rules of this port and is in good condition to proceed on her voyage. An allowance of 3 inches in draft has been made for extra coal to be taken in at coaling points; draft of water forward, 21.3; aft, 21.0½; free board, 4 feet 9 inches.

Given under our hands, at New Orleans, this 13th day of July, 1883.

[SEAL.] THOS. CONWAY.
W. M. BAKER.

Protest by De Wolf & Hammond Against Gomila & Co.

UNITED STATES OF AMERICA.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

78 Be it known that on this 6th day of the month of July, in the year of our Lord 1883, and of the Independence of the U. S. the 108th, *that* I, John G. Eustis, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, at the request of Messrs. De Wolf & Hammond, agents for the steamer Deronda and acting for the owners of said steamship in a certain contract of charter party entered into with Gomila & Co., of this city, charterers of said steamship, did proceed, during business hours, to the office of said charterers, Gomila & Co., at No. 89 Magazine street, in this city, in order to demand of them the fulfillment of the contract set forth in the charter party aforesaid, being accompanied by James Tyman & C. G. Desfogges, competent witnesses, of lawful age and residents of this city, but found no member of the firm in the office. I, notary, then explained to S. Abat, the correspondence clerk of said firm of Gomila & Co., the object of my visit, and the said clerk stated to me that none of the members of

the firm were in the office, and I then handed to said S. Abat, for his employers, an original notification by De Wolf & Hammond, a true copy whereof being on the reverse hereof written.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the said Gomila & Co., the charterers of said steamship, as against all others whom it may or doth concern for all damages, costs, charges, and interest that may or shall be suffered for want of fulfillment of the aforesaid contract of charter made by Gomila & Co.

Thus done and protested in the presence of Jas. Tyman and Henry M. Hyams, lawful witnesses, residing in this city and hereunto expressly called as such, who have signed with me, notary.

79 (Original signed) H. M. HYAMS.
JAS. TYMAN.
J. G. EUSTIS, *Not. Pub.*

A true copy of the original on record in my office 6 July, 1883.
J. G. EUSTIS, *Not. Pub.* [SEAL.]

The notification referred to by the notary is the same document that is already copied at page — of this transcript.

Protest by De Wolf & Hammond Against E. Forestier & Co.

UNITED STATES OF AMERICA,
State of Louisiana, Parish of Orleans, City of New Orleans:

Be it known that, on this 6th day of the month of July, in the year of our Lord 1883, and of the Independence of the U. S. of America the 108th, *that* I, John G. Eustis, a notary public in and for the Parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, *personally came and appeared* at the request of Messrs. De Wolf & Hammond, agents for the steamship Deronda and acting as agents for the owners of said steamship in a certain contract of charter party entered into by them with Gomila & Co., of this city, as charterers, and by said Gomila & Co. transferred to E. Forestier & Co., of this city, did proceed, during business hours of the day, to the office of E. Forestier & Co., in Gallier's Court, in this city, and, in the presence of James Tyman & C. G. Desforges, competent witnesses, did demand of B. T. Bangston, a member of the firm of E. Forestier & Co., that his said firm comply with
80 the terms of the charter party, as transferees of the original charterers, Gomila & Co.; and, at the same time and in the presence of the same witnesses, I handed to said B. T. Bangston an original notification of De Wolf and Hammond, a true copy whereof being on the reverse hereof written, and to the demand made the reply of said B. T. Bangston was that the same was all right.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well

against the said E. Forestier & Co., the transferees of Gomila & Co., in and to said charter party, as against all others whom it doth or may concern for all damages, costs, charges, and interests that may or shall be suffered for want of fulfillment of the terms of the aforesaid contract of charter party with said steamer Deronda.

Thus done and protested in the presence of James Tyman and Henry M. Hyams, witnesses, who have signed with me, said notary.

(Original signed) H. M. HYAMS.
JAS. TYMAN.
J. G. EUSTIS, *Not. Pub.*

A true copy of the original on record in my office.
[SEAL.] J. G. EUSTIS, *Not. Pub.*

The notification referred to by the notary is the same document already copied at page — of this transcript.

Protest by the Master and the Agents of the Steamship Deronda.

UNITED STATES OF AMERICA,
State of Louisiana, Parish of Orleans, City of New Orleans:

81 Be it known that on this 7th day of the month of July, in the year of our Lord 1883, and of the Independence of the U. S. of America the 108th, before me, John G. Eustis, a notary public in and for the parish of Orleans, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared George H. Eldridge, captain of the steamer Deronda, and W. H. De Wolf, of the firm of De Wolf & Hammond, agents for the steamship Deronda, acting on behalf of the owners of said steamship, who declared that whereas, on the 6th day of July inst., 1883, a written notice was served on Gomila & Co. and E. Forestier & Co., charterers and transferees, that the said steamship would be ready to receive the balance of the cargo on 7 July, 1883, at 10 a. m., at this port; and whereas the said appointed time has arrived and passed and no compliance has been made or attempted to be made with said notice & demand: Now, therefore, the said appearers, acting in behalf of said steamship Deronda and her owners, do solemnly and publicly make this formal protest for the protection of the rights and interest of said steamer and her owners in the premises, protesting that the said steamer was, at the said date and hour named, to wit, July 7, at 10 o'clock a. m., and is now in readiness to receive from said charterers and transferees, Gomila & Co. and E. Forestier & Co., the balance of the said cargo, as per charter party, and hereby protest said charterers and transferees for not delivering the same, and will hold the said Gomila & Co. and E. Forestier & Co. and all others whom it may or doth concern, jointly and severally, liable for any and all loss, demurrage, or damage of any and every
82 nature that has or may arise in the premises.

Thus done and protested, on the day and year above men-

tioned, in the presence of Henry M. Hyams and James Tyman, lawful witnesses, who have hereto signed their names with the appearers and me, notary.

GEO. H. ELDRIDGE, *Master.*
W. H. DE WOLF,
Of De Wolf & Hammond, Agents of S. S. Deronda.
H. M. HYAMS.
JAS. TYMAN.
J. G. EUSTIS, *Not. Pub.*

I, John G. Eustis, the aforesaid notary, do hereby certify that on the day of the above protest I did serve on the parties in interest a duly certified copy of the foregoing act as follows, to wit, by delivering in person to Larned Torrey, a member of the firm of Gomila & Co., at their office, No. 89 Magazine street, in this city; and also delivered another copy to E. L. Gabit, a clerk in the employ of E. Forestier & Co., at their office, in Gallier's Court, in this city, none of the members of said firm being then in.

In witness whereof I grant these presents, under my signature and impress of my seal of office, in the city of New Orleans, on this 7 day of July, A. D. 1883.

(Original signed)
H. M. HYAMS.
JAS. TYMAN.
J. G. EUSTIS, *Not. Pub.*

A true copy of the original on record in my office.
[SEAL.] J. G. EUSTIS, *Not. Pub.*

83 FORM NO. 9.

Certificate of British Registry.

Signal letters:
Top flag, Q.
2nd flag, W.
3d flag, F.
Bottom flag, M.

Particulars of Ship.

Official number of ship.	Name of ship.	No., date, & port of registry.	No., date, & port of previous registry (if any).
68958	Deronda	21; in 1877; Sunderland	

Whether British or foreign built.	Whether a sailing or steam ship; how propelled.	Where built.	When built.	Name & address of builders.
British	Steam; screw	Sunderland, in the county of Durham.	1877	J. L. Thompson & Sons, North Sands, Sunderland.

No. of decks, two.
No. of masts, two.
Rigged, schooner.
Stern, elliptic.
84 Build, clincher.
Galleries, none.
Head, none.
Frame-work, iron.

	Feet.	Inches.
Length from fore part of stem under the bowsprit to the aft side of the head of the stern post	260	5
Main breadth to outside plank	34	
Depth in hold from tonnage deck to ceiling at midships	28	8
Depth in hold from upper deck to ceiling at midships in the case of 3 decks & upwards		
Length of engine-room (if any)	38	02

Particulars of Engines (if any).

No. of engines.	Description.	Whether British or foreign made.	When made.	Name & address of makers.	Diameter of cylinders.	Length of stroke.	No. of horse power combined.
Two	Direct acting; compound surface acting.	British	1877	Geo. Clark, Southwick, Sunderland.	33 & 67 inches.	39 inches.	180

Particulars of Tonnage.

	In register tons.	In cubic metres.
Gross tonnage under tonnage deck	1,583.48	
Closed in spaces above tonnage deck bridge	92.46	
85 House	7.18	
Chart-house	3.75	
Gross tonnage	1,688.19	4,777.58
Deductions as *per contra*	598.23	1,092.99
Regular tonnage	1,089.96	3,084.59

	No. of tons.
Deductions allowed on account of space required for propelling power	540.22
On account of space required by seamen or apprentices & appropriated to their use & kept free from goods & stores of every kind, not being the personal property of the crew	58.01

I, the undersigned, register of shipping at the port of Sunderland, hereby certify that the ship the description of which is prefixed to this my certificate has been duly surveyed, & and that the above description is true; that John Edward Frail, whose certificate of competency is No. 91146, is the master of the said ship, and that the name, residence, and description of the owner and number of shares (64), sixty-four, held by him are as follows:

Name, residence, & occupation of the owner.	Number of sixty-fourth shares.
James Henry Culliford, of Sunderland, in the county of Durham; ship-owner.	Sixty-four (64) shares.

86 Dated at custom-house, Sunderland, the 24th August, 1877.
(Sig.) WM. MITCHELL,
Registrar of Shipping.

NOTICE.—A certificate of registry is not a document of title. It does not necessarily contain notice of all changes of ownership, and in no case does it contain an official record of any mortgages affecting the ship.

In case of any change of ownership it is important for the protection of the interest of all parties that the change should be registered according to law.

Should the vessel be lost, sold to foreigners, or be broken up, notice thereof, together with the certificate of registry, if in existence, should immediately be given to the registrar of shipping at the port of registry, under a penalty of £100 for default.

For further particulars apply to the registrar of shipping at any custom-house (No. 481).

N. B.—Endorsements of changes of owners and masters must be made as directed by the instructions to registrars & will follow here:

CUSTOMS, SUNDERLAND, 4 *Sept.*, 1877.

87 Wm. Knott, cert. of comp'cy No. 22949, has become master.
(Sig.) —— ——.

CUSTOM-HOUSE, CARDIFF, 17 *Jan'y*, 1880.

I certify that Henry I. Halsey, cert. of competency No. 83403, has become master.
(Sig.) G. W. BARRETT, *Registrar.*

CUSTOM-HOUSE, LIVERPOOL, 18 *May*, 1880.

I certify that I. Kinnerly, cert. — competency No. 81796, has become master.
(Sig.) —— ——.

CUSTOMS, GLASGOW, 21 *May*, 1879.

John Forbes, cert. of competency No. 8287, is now master.

(Sig.) —— ——.

CUSTOMS, LIVERPOOL, 7 *Nov'ber*, 1879.

Rob't Matthew Clarkson, cert. of competency No. 8862, has been appointed master.

(Sig.) GEO. THOMAS, *As. Regist'r.*

CUSTOM-HOUSE, BARROW, 21 *June*, 1881.

I certify that Geo. Henry Eldridge, certificate of competency —, has now become master.

HEARN, *Reg'r.*

BRITISH CONSULATE, NEW ORLEANS, *July* 16, '83.

A true copy of the original.

[SEAL.] WILLIAM JOHNSON,
British Pro Consul.

(Here follows diagram, marked p. 88.)

89 *Correspondence Between De Wolf & Hammond & Messrs. Culliford & Clark.*

De Wolf & Hammond to Culliford & Clark.

NEW ORLEANS, *June* 22, 1883.

Mess. Culliford & Clark, Liverpool.

DEAR SIRS: "Deronda." We have had considerable cabling about this steamer, and have at last fixed her, and we now beg to enclose copy of charter, which, we trust, will be found in order. We could have fixed her some time ago at 5–6, but owners would not accept this rate. She has been offered here by French & Co., Forstall & Clayton & Co., Ross, Keen & Co., Eugstor & Co., and ourselves, and, as we only have 3 large shippers here and some 3 small shippers, you may imagine she has been well circulated in our market, and our shippers had got tired of making offers on her.

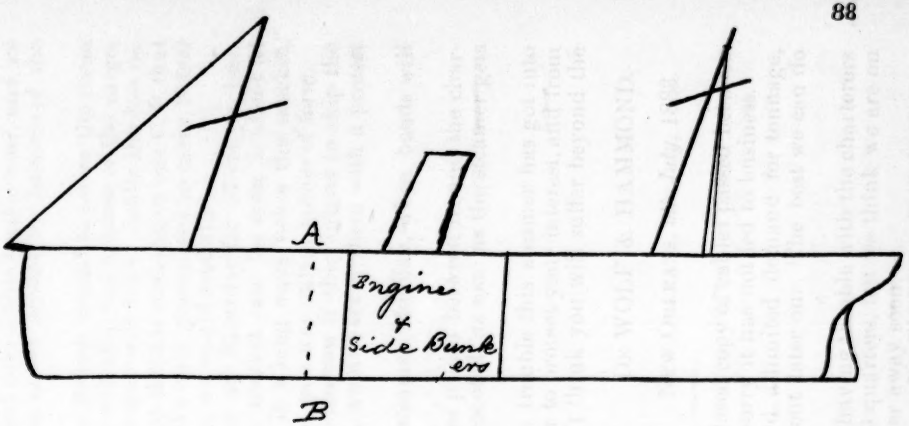
We enclose all our forms of charters, so that when we cable you offers you will have them before you.

Yours, DE WOLF & HAMMOND.

NEW ORLEANS, 7 *July*, 1883.

Mess. Culliford & Clark, Sunderland.

DEAR SIRS: "Deronda." We enclose copies of cables passed between us respecting this steamer. She finished loading on the 30th and had good despatch, as she was half loaded before she
90 was discharged. She failed to carry the quantity guaranteed, 10,000 qrs., and the charterers claimed for damages, as, they said, the party who bought the cargo in Copenhagen would not accept it, as it had fallen short of the quantity.

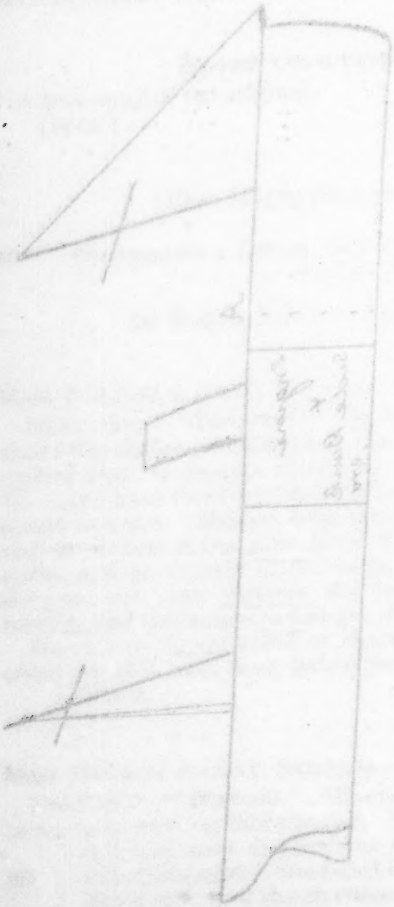


No. 290.
Culliford et al. } p. 88
v.
Gomila et al. }

"Gomila" Deronda

Abbreviated G. D

"11965"



They said the cargo was sold at 28–3 per quarter, C. F. J., for June shipment, and as the best price obtainable was 25– you can understand why the cargo was refused.

They wanted owners to pay the difference or buy the cargo at the price it was sold at. We consulted our lawyer, Mr. McConnell, and he said there was no alternative but to take the cargo in some way.

The ship was as deep as the surveyor would allow her to go, and the coal on board was requisite to take her to Sidney.

We suggested to call at two or more points to coal and to take out the bunker coal, leaving on board only sufficient to take her to Newport News, and then coal there for Sidney, as our charter party allows the steamer to call at any ports for coal.

He said if this could be done we would have a good case.

So Capt. Eldridge has discharged part of this bunker coal, and we have tendered the room to them, under protest, for balance of the cargo.

We have held a survey by the British consul to prove the room is there. We do not expect they will ship the balance of the cargo, as it is not a June shipment, and they will try to saddle the loss on the ship that they have made, but there is nothing in our C. P. that it was to be a June shipment. We only guaranteed to carry 10,000 quarters, and no stated time when we would load that.

The cargo was sold at auction on Saturday for 37 cts. pr. bus., with privilege of the C. P. The market rate for corn is about 54 cts., so you will notice it is a long ways below the market, 91 and our opinion is that the sale was only a matter of form.

We will have a reply to-morrow if they intend to ship the balance of the cargo; and, if not, we will serve them with a protest claiming dead freight.

We expect they will seize the steamer Monday, when bonds will have to be given.

Considerable correspondence has passed between us and the charterers, and we will send you copies of all as soon as the steamer gets away.

We are extremely sorry for the trouble this steamer has got into and we are doing all in our power to protect your interest, and from Mr. McConnell's opinion we don't think you will suffer beyond the delay of the steamer.

DE WOLF & HAMMOND.

NEW ORLEANS, *9th July*, 1883.

Mess. Culliford & Clark, London.

DEAR SIRS: "Duro." We enclosed copy of cables passed between us respecting this vessel and are sorry it has not led to business.

Freights are dull at present and a limited demand for tonnage, but we hope to see an improvement later on. The best we can do at present is 5–3.

Deronda is still here and we are having trouble with the charterers respecting her guarantee of 10,000 quarters, but we think we are on the right side and hope to have her away soon.

Yours truly, DE WOLF & HAMMOND.

92 Yours of the 23d just received, S. S. Viceroy. We may be able to offer you a lump sum; charter later on.

NEW ORLEANS, 18 *July*, 1883.

Mess. Culliford & Clark, Sunderland.

DEAR SIRS: We cable you in reply to yours that Deronda sailed this a. m., between 1 & 8 a. m. She left at 5.10 p. m. We could not get her affairs fixed up so as to protect you until after midnight.

We enclose captain's advice of draft £1,631.6.7, which d'ft please protect. All vouchers, protests, &c., go forward to you to-night or to-morrow morning, when we will write you at length. We certainly agree with lawyers your case is beyond almost dispute. It is certainly an unfortunate thing. The documents forwarded you will show the matter fully, and you can depend we will see that nothing is spared in your interest and to give you satisfaction. To add to complication the inward charterers, J. P. Macheca & Co., have failed, owing the ship some $2,500. We have stopped the salt in bonded warehouse, and, as the duties are not paid, think lien can be established. We have also another case for London friends—to collect an order on their people—which will assist us.

The writer arrived safely on the 12th. Freight 5–3, orders 5–direct, 5–1, Baltic. We have just fixed two steamers, 42–6 direct U. K. or Continent, and one 44–10 Sept., cancelling. Writing you fully in morning,

Yours truly, DE WOLF & HAMMOND.

93 NEW ORLEANS, 18 *July*, 1883.

Mess. Culliford & Clark, Sunderland.

DEAR SIRS: We now beg to hand you all documents regarding Deronda as per memo., marked A, also enclosed.

The captain's sworn statement gives you a full history of the case, which, with the letters of Gomila & Co., E. Forestier & Co., J. B. Camors & Co., and A. Carriere & Co., will show you how this case has been wriggled about with the object of sticking the steamer for loss, an object our lawyer, Mr. McConnell, does not think they will attain. He has written a lengthy communication to Mr. Adamson about the matter, which you will no doubt see. It has been a fearful piece of work and worry and expense all through, but we are sanguine your interests are well protected, and that all costs and damages will be gained by the ship. We have had about 25 years' experience of shipping disputes and law, but never saw such a barefaced thing as this, and we will devote our best energies in your behalf to see that the steamer has justice. James McConnell, the lawyer, left last Friday for — summer, as nothing can be done before the courts open in November. He left instructions with Mr. Upton and Mr. Beckwith, lawyers, his representatives during his absence, that a retaining fee of $1,500 must be paid before the vessel sailed. We would pay no such amount without your orders and cabled you as per enclosed copies, resulting in your orders to pay it

under protest, which we have done, and enclose protest and receipt for the $1,500.

It appears that lawyers here have found it difficult to get their money when they depended on remittances from owners or the Indemnity Society, which made them take this stand. It appears that Beckwith had a case for Taylor & Sanderson (Cypress case)
94 and drew for costs and they let his bill come back.

As to bonds, there was no necessity cabling to Forstall, Clayton & Co. about it, as they could not do it, as personally ours would be taken before theirs as of non-value in every way and was acceptable to parties in dispute, but court ruled that the bond must be a banker's, which can be done better on your side, and Mess. A. Carriere & Co., Barings' agents here, have done what was needful. The Deronda, as we cabled you, goes to Elsinore for orders to discharge at Copenhagen or Aarhons; her freight list amounts to £2,875.

We learn Mr. Adamson cabled parties here to know when Deronda would sail, but did not reply to Mr. McConnell's cable to him insisting upon fee. The failure of J. P. Macheca & Co., the inward consignees of the Deronda, is another misfortune. We have seized the salt in the bonded warehouse through a lien—notice the way to do it in this State—and as the duties on the salt are not paid we hope to establish the lien and get you the freight. Macheca's statement shows $2,402 due the ship, but it is more than that, as items marked * are wrong.

Capt. Eldridge has given us power of att'y to look after this closely and keep you advised and will remit when collected.

Have you not got some recourse against the Mediteranean charterer? It would be well to try on what you can do there as well.

The expenses so far on ac. of—Gomilas have sued—foot up $2,783.06, without insurance or comm. Can you not get some bond from receivers of cargo to secure you for damages and recovery of their expenses?

The peculiarity of the case is that Gomila & Co. take the action, altho' E. Forestier & Co. are the charterers, Gomila & Co., the original charterers, having instructed us to hand them a
95 charter, which we did, when Gomila delivered us up his charter. This is quite customary and is often done, as indeed we have done it a short time ago in the case of the Elginshire. We had her chartered to E. Forestier & Co., and they transferred her to Gomila exactly in the same way that the Deronda was done. We prefer in transfers simply letting merchants endorse the transfer, but they are all competitors in grain and won't consent to this, preferring a clean charter. The insurance in disbursements we had to pay, 2% net, as the probability is the Deronda will have to call at usual ports for coal; it is understood that we get a return of the only calls at & port, which we will remit you. We enclose bill of exchange for £84.7.0, being what you charged Capt. Eldridge, deck load, on Deronda to Havre, last voyage, and which we succeeded in inducing Messrs. Gomila & Co. to pay. Please place this to credit of Capt. Elridge.

We cannot think of anything more to say at the moment. We

wish to put this matter through to your satisfaction and bring you out with- loss, and will do all possible to that end.

Douro. We note you would not accept our offer of 5–3. We trust you will send us this boat, as we can do well for her.

We will require a large number of steamers this season, and trust you will not forget and give us a number.

Yours truly, DE WOLF & HAMMOND.

NEW ORLEANS, 23 *July*, 1883.

Messrs. Culliford & Clark, Liverpool.

DEAR SIRS: We are favored with yours of the 7 inst. and also yours of the 23d ult'o. The writer reached here safely on the
96 12th to find the Deronda in serious dispute with Gomila & Co. Those troubles are the curse of this place, and this case is particularly outrageous, and although the lawyers are sanguine, as we are ourselves, that the steamer is safe, yet it caused great expense, fearful delay, and worry to fight the ingenious efforts to saddle vessel.

Mr. Culliford, in his letter of 5th, is much annoyed, and very rightly so, but he cannot fully understand the case and the efforts we were compelled to take for his protection until he gets all the documents and facts forwarded to him on the 18 inst.

The question hinged on the fact that the vessel was to take 10,000 qrs., which the captain said she would; but when she had within 364 qrs. of that quantity she was found to be full all over and deep enough, and when this — known charterers gave no chance but to pay at once what they claimed as loss, some 3– per quarter, on the whole cargo.

This would not be entertained, and as no compromise would be listened to by charterers the only thing was to take out more coal and water and carry the 10,000 qrs. and call at several ports for coal. This matter was fought tooth and nail, as they did not want this done, and every effort was tried to stop it, even to getting certificate taken from her, on the plea that there was bulk grain in her 'tween decks, and necessitating the delay and expense of discharging part of her 'tween decks. The grain appears to be sold to other parties, but we finally succeeded in getting the remaining quantity to make up the 10,000 qrs,, with which we sailed for Elsinore, for orders to discharge at Copenhagan or Aarhons.

Your telegram from Mr. Culliford from Gresham's house office when he was in London on 18 June proves he thought she would have little difficulty in carrying the 10,000 qrs. In fact, she
97 has carried, as he stated later, some 10,384 qrs. to Bordeaux.

Mr. Culliford's telegram from London to you of 18 June was as follows: Fix Deronda 5–6, Aarhons, guaranteeing 10,000 qrs., provided capt. agrees this quantity; no doubt Orleans quite due; must have lighterage, merchant's risk, and expense; think Hammond should try five — nine pence; just leaving for Sunderland.

We worked the 9th, and but for this trouble would, as things go, have been a good voyage, so far as it was possible for us to work it. To add to the misfortune the inward agents of the steamer (J. P.

Macheca) failed, owing some $2,500 freight. There is a lien on the salt in bonded warehouse, and it is hoped this will be established and the balance of the freight collected.

(Sig.) DE WOLF & HAMMOND.

We trust Mr. Culliford will not blame us in the matter of the Deronda. There will certainly be no reason for it, and we would be sorry if such were the case, as our experience *of* as owners and brokers largely here and in Canada *coal in* the ability to do what has been done—(*i. e.*) protect owners on all points.

NEW ORLEANS, 25 *July*, '83.

Messrs. Culliford & Clark, Sunderland.

DEAR SIRS: We have your letter of the 5th inst., the contents of which pained us very much, and we hastened to cable you at once, as you were apparently not in possession of facts. We enclosed copy of cablegrams. We do not know of any further facts to state than those already written you.

98 We think you will see by the documents that the course pursued was the only one to follow.

We think Gomila has overshot the mark this time. It is certainly a very great injustice to state that we favored him.

Your documents will show the contray. We are quite independent of him and have always stated so. The fact is he is more dependent on us, and we could always do a larger business with him and others, but have always picked what we have done, which probably accounts for the very few troubles we ever get mixed up with, trusting you will see this matter in its true light and let us retain your confidence. Deronda. We enclose copy of letter to your Liverpool house. McConnell, the lawyer, wants to know by whom the Deronda is owned and by whom it can be proved. The lawyers desire to take out a commission for the purpose of establishing ownership of steamer. They think it better to furnish the names in full and their respective residences and the number of shares held by each.

DE WOLF & HAMMOND.

Copies Cables.

	Code words.	Sent.
July 21	Vapro	Your letter of 5th received
	Convalesce	you are mistaken better
	Vencund	await our letter of 18th and study documents before accusing wrongfully also refer your senior's telegram from London
	Vestedad	June 18th to Liverpool house
July 25		about guarantee Deronda charterer
99		ask liberty 25

	Code words.	Sent.
July	Serrated	orders at coaling port
	Dumplist	calling at Cork for orders also wanting privilege Cork to Elsinore.
	Condicible	what do you propose
		received
July 28		anxious oblige
	Condenada	what are shippers views

Of course, if the ship were dealing with people who were disposed to be straight, the matter would have been more simple and as easily arranged and as inexpensively as we have settled many disputes in our large experience as owners and brokers here and in Canada the past 20 years, but when you find parties unwilling to listen — compromise that was —, or to do anything but suck the ship to the pound of flesh, there was no course to take but protect the steamer at all points.

NEW ORLEANS, *July* 28, '83.

Mess. Culliford & Clark, Sunderland.

DEAR SIRS: Mess. E. Forestier & Co., the charterers, asked us to cable you on the 25 inst. if you would give liberty to order the Deronda from coaling port to Cork for orders, as per enclosed copy of cables, and we have your reply to-day, which we submitted to them, but they said they did not care for the liberty now, so we cabled you to that effect.

100 Deronda. Inward freight, the customs according to law; notified us on Thursday that the owners of salt had applied for withdrawal from bonded warehouse, and that they would give such permission for 9 a. m. to-day on their payment of duty, and that after this 24 hours' notice our lien for freight would be over, and on consultation with our lawyer we libelled the salt, so as to do all in our power to keep possession of salt until we get the freight.

DE WOLF & HAMMOND.

Correspondence.

Copy.

SUNDERLAND, 19 *June*, 1883.

W. J. Hammond, Esq., c. of Green, Stewart & Co., Rumford street, Liverpool.

DEAR SIR: "Deronda." We are obliged for your telegram, and have telegraphed our L'pool firm to close with your offer if they think it wisest to do so, but excluding Rouen, where she cannot go, and we must say we considered all New Orleans freight as excluding Rouen. We wait to learn that all is in order.

Y'rs faithfully, CULLIFORD & CLARK.

Wm. Hawkes Smith:

We are allowing the 3*d.* off with a very ill will. It is an innovation we strongly object to.

LONDON, 23 *June*, 1883.

101 Messrs. De Wolf & Hammond, New Orleans.

DEAR SIRS: We are duly in receipt of your favor of the 9th instant and carefully note contents.

Deronda. We are glad that your Mr. Hammond succeeded in fixing this steamer while here, and we hope to soon have the pleasure of doing another charter with less trouble to your good selves. Douro s'l'd — Cardiff 12th inst. for Cape Verde. Please keep us advised as to her rates. We are glad to note that you expect freights to improve in August, and hope this may be so, as an improvement is much needed. Awaiting your further valuable advices, we are, dear sirs,

Yours faithfully, CULLIFORD & CLARK.

D. S. Diggens:

S. S. Viceroy. Would entertain a mixed cargo of cotton and grain. As soon as this is obtainable please let us know ab't leaving Bombay.

LIVERPOOL, 23*d June*, 1883.

Messrs. De Wolf & Hammond, New Orleans.

DEAR SIRS: We are pleased to have made a charter through your Mr. Hammond; regret he had so much trouble fixing Deronda.

Please quote "Douro" sailed from Wales for Cape Verde on the 12th inst. and is open for freight home from New Orleans.

We have a large boat, 1,570 reg. ts., open for cotton; lay days 15th Sept., cancelling 15 Oct., or would take cotton and grain.

102 Please keep her before you and cable us if you have any chances of fixing her at anything like reasonable rates. Owners would take 13–32, Liverpool, 27–64; cont. proportionable for grain. 2½% commission to you. No address.

(Sig.) CULLIFORD & CLARK.

SUNDERLAND, 5*th July*, 1883.

Messrs. De Wolf & Hammond, New Orleans.

DEAR SIRS: We received your cable on Sunday informing us that the Deronda has loaded 9,635 quarters and the cargo sold not less than 10,000 quarters @ 28–3, present value 25–; buyers refuse acceptance as cargo falls short. Charterers hold ship responsible. In reply to this we cabled at once for you to compromise the claim and pay the difference of 3–3 pr. quarter as between the quantity stated to be shipped and the 10,000 quarters.

We were astonished on Tuesday to find on receipt of your cable, "Charterers trying to resell cargo," that you had evidently misunderstood the purport of our message, but how this could be done by any sane person into meaning that we were willing to pay the difference of 3–3 per quarter upon the whole cargo we are at a loss to understand, and can only come to the conclusion that such a meaning has been construed purposely. How a business man supposed to be acting on behalf of an owner could think that when a diffi-

culty like the present arose, he (the owner) should right off agree to give up more than half his total freight on such a voyage is too much even for any stretch of imagination, and if our interests can only be protected in the way you have managed this
103 business the less we place in your hands the better.

In the beginning of the negotiations for the charter of this ship there was a considerable mull, at which we expressed ourselves pretty strongly to your Mr. Hammond when in Liverpool, and when you offered us this freight we accepted it subject to the captain being satisfied he could carry the requisite quantity, and your cable of the 19th ulto. distinctly told us she could carry about 10,000 quarters, from which we concluded you had consulted with the captain. In fact, his letter informs us you had seen him with our cable; but we must call your attention to the fact that in the same cable you informed us about 10,000 quarters, and how you could insert in the charter not less than 10,000 quarters we are at a loss to comprehend. Under the circumstances, therefore, you will see that you are clearly liable te us for whatever the results of this miserably mismanaged business may turn to. We can come to no other conclusion than that you have simply played into the charterers' hands. Your cables to us since Sunday all go to prove this.

However, we have consulted our indemnity association, which protects us against all attempts of imposition, and they have wired instructions to their lawyer to see you and the captain, and, if necessary, to bail the ship and fight any question of liability after the ship is discharged at her port of destination. Who can prove that the ship has not 10,000 quarters on board? As we have informed you, she has discharged considerably over this quantity at Bordeaux of 480 lbs. to the quarter. And if the charterer has shipped such description of grain that will not allow her to take the quantity you have agreed to we cannot see it is our fault.

The whole business has distressed us immensely, but we hope it may yet terminate better than it looks at present, as we should not be surprised to discover that it is an attempt on the part of
104 the charterers to impose upon us.

Whilst writing your reply has come that you were consulting M. Connell and trying to arrange —, but no mention about the ship's sailing. We, therefore, cabled you, Why the delay? To give bail and get the ship away. We are at a loss to understand why the ship should be detained during these negotiations. The whole business is sickening. If you had understood your business at all you would have dispatched and settled the question after she had left, but how you have allowed the charterer to detain the ship in the way he has done we have yet to learn, but we certainly can come to no other conclusion than that you have grossly neglected our interests.

Yours truly,
(Signed) CULLIFORD & CLARK.

12 RUMFORD PLACE, LIVERPOOL, 7 *July*, 1883.

Messrs. De Wolf & Hammond, New Orleans.

DEAR SIRS: Your favor of the 22 ult. duly to hand. We are sending same to our Sunderland house and hope they will be found in order. We note, you say, French, Forstall, Clayton & Co., Ross, Keen & Co., Engster & Co., as well as yourselves, were all offering Deronda. What does the word "offering" mean with you? Of course we can't help people naming our boats, but are quite certain no one but yourselves had any authority to offer her. Please keep us well advised of all your grain & cotton freights. If you can fix Viceroy for grain & cotton combined don't fail to cable us.

(Signed) CULLIFORD & CLARK.

105 12 RUMFORD PLACE, LIVERPOOL, 7*th Aug.*, 1883.

Messrs. De Wolf & Hammond, New Orleans.

DEAR SIRS: Your favor of 23d ulto. duly to hand & carefully noted. We have sent same to our Sunderland house for their perusal.

We really think you should avoid doing business with Gomila, as it appears he never takes a steamer without having some trouble over the charter.

We have been working the S. S. Kent through Messrs. Jno. S. De Wolf & Co. here, and have a memo. from them to-day offering 44, but this is not good enough, more especially as Gomila is the charterer.

Should we succeed in getting an offer at 45 we will let you have it. Meantime we are offered more money from Galveston, but owners do not seem to care about it.

Yours faithfully,

(Signed) CULLIFORD & CLARK.

SUNDERLAND, 13 *Aug.*, 1883.

Messrs. De Wolf & Hammond, New Orleans. (Deronda.)

DEAR SIRS: Your letters re- this wretched business have all been received and well noted, but we regret to say they do not much alter our opinion of the manner in which this case has been handled by you. The captain's protest, although probably correct, is about as weak a document as we ever read, unless your object was to disclose our hand and so strengthen that of the parties taking the action against the ship.

106 Will you tell us why you and the captain rushed away to Gomila as soon as it was found the ship had not taken the guaranteed quantity? What other position could you possibly expect him to take than holding the ship responsible for a breach of the charter? Both you and the captain knew that the ship was guaranteed to carry 10,000 quarters, and also knew there was no guarantee as to the time of shipment. With these two facts, will you tell us why the ship was allowed to be so hurriedly loaded & why it did not dawn upon you at once to take bunkers out (which

should never have been put in)? In running away to Gomila you really played into his hands.

If our captain was not competent for such a matter as this we would have thought ordinary common sense would have told you that care must be taken to get the guaranteed quantity into the ship, & to do this how did you proceed actually with the doubt in your minds about the ship carrying the quantity? You allowed her to coal for Sydney.

Ordinary caution for our interests should have prevented this and told you the ship must coal for Newport News. The whole affair is so bereft of all business care that we sicken and feel disgusted with the entire business; it is bristling with points that you woefully neglected. Of course, now, these charges against you are useless; the mischief is done, but we think in common fairness they must move on to a point that must compel you in the future to more carefully protect us, as well as carefully watch and do all in your power to bring us without loss out of this serious affair. As for the captain, he cannot possibly have given the business a moment's consideration; in fact, we doubt whether it is possible he was on the spot; probably pleasuring up the Mississippi or, if not in that direction, enjoying himself in the city, without any consideration whatever as to whether the ship would carry the quantity or not.

107 Had we not put this responsibility upon him and you in the first negotiations and accepted the charter without reference as to whether the ship would carry the quantity or not, we could then have understood — our error might have occurred, but when we said accept the charter, provided the captain was satisfied — ship can carry 10,000, one of his and your first duties on our behalf was to see that she could carry it.

The charges in your account are simply monstrous, and we hesitated whether we should accept your draft or not, but ultimately did so, with a hope that you will explain & return us what we consider overcharged. As to the inward freight, imagine brokers, who pretend to act in behalf of owners and for their interests, to allow a bankrupt to get possession of the cargo before payment of freight; the business is enough to ruin any ordinary ship-owner, and really we have great doubts in our minds whether you could not be made responsible for the loss we suffer. We always have every consideration for those acting on our behalf and inclined to look most favorably on any short-comings, but these are beyond precedent and more than we can endure.

We note you have put in a lien upon the salt, & shall be glad to know it can be enforced and we shall get the balance of our freight.

We shall have a good deal more to say upon this business, but for the present we refrain, and in the meantime rely upon you doing what is necessary to protect our interests.

We cannot imagine what your lawyers want as regards ownership. You say & they did see by the ship's register our senior is the owner. What more can be required?

The case has been well discussed here and in Tyne & is

108 looked upon by all as one of the grossest attempts to swindle that

has been perpetrated for some time at New Orleans. The indemnity association will fight it to the last. As you are aware, no doubt, the cost to them is of no moment. They have twenty millions of capital at their back, and the case will be taken to Washington in case of need. We hope Gomila will be good enough for the law costs. Would you please inform us his position and what property he holds.

(Signed) CULLIFORD & CLARK.

United States District Court for the Eastern District of Louisiana.

No. 11965.

The President of the United States to the master of the S. S. Deronda, the mate, and engineer:

You are hereby commanded to appear before K. Leow, U. S. commissioner, at clerk's office, district court of the United States for the eastern district of Louisiana, on the 11th day of July, 1883, at 10½ o'clock a. m., and there testify the truth, according to your knowledge, in the matter of Gomila & Co. *vs.* Culliford & Clark, and herein fail not under the penalty of $250.

Clerk's office, New Orleans, July 10th, 1883.

(Signed) K. LOEW,
Deputy Clerk.

Received July 10, 1883, and on the same day, month, and
109 year I served the summons on the master, mate, and engineer of the steamship Deronda in the following manner: By handing a true copy of the within summons on T. R. Hutchinson, 2nd mate of steamship Deronda, the master, 1st mate, and engineer being absent at the time of service.

(Signed) JOS. L. MONTICREZ,
D'pty Marshal.

United States District Court for the Eastern District of Louisiana.

The President of the United States to the master of st'r Deronda, —— ——, engineer:

You are hereby commanded to appear before Kilian Loew, U. S. commissioner for the district of Louisiana, at the clerk's office of the district court of the U. S. for this district, on the 13th day of July, 1883, at 10½ o'clock a. m., and there to testify the truth, according to your knowledge, in the matter of Gomila & Co. *vs.* Culliford & Clark, and to bring with you the ship's log book containing the daily entries of the last voyage to this port and up to the present day, and also the log book containing the daily entries on the ship's last voyage from this port, and herein fail not under the penalty of $250.

U. S. commissioner's office, New Orleans, July 12, 1883.

(Signed) K. LOEW, *D'y Clerk.*

Received July 12, 1883.

On the 12th day of July, 1883, I served a true copy of the
110 within subpœna on the engineer and master of the steamship Deronda by handing the same to them in person.

(Signed) DAN. A. ROSE,
Dy' U. S. Marshal.

United States District Court for the Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

Testimony taken on the part of libellants in the above entitled and numbered cause, on the 11th day of July, 1883, before K. Leow, Esq., U. S. commissioner.

Appearances: J. Ward Gurley, Jr., Esq., proctor for libellants; H. E. Upton & J. R. Beckwith, Esq., appearing *pro hac vice*, without prejudice to any right, exception, ground of defense, or irregularity in the proceedings herein, and waiving no rights or any plea, exception, motion, and taking advantage of any error of irregularity in the proceedings herein.

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George Henry Eldridge, page 2; David Robson, 7; 11 pages.

Witness GEORGE HENRY ELDRIDGE being duly sworn as a witness for libellants, and examined by J. WARD GURLEY, Jr., Esq.:

Q. Are you the master of the steamship Deronda?
A. Yes, sir.
Q. How long have yon been her master?
A. Two (2) years.
Q. How many trips have you made on her; how many voyages have you made?
111 A. About ten voyages, I think.
Q. Do you remember from what ports to what ports?
A. In the American trade.
Q. Have you made any voyage from the port of New Orleans before?
A. Yes, sir; once, the last time.
Q. From here to where?
A. From here to Havre.
Q. What is the average rate of speed of that vessel?
A. About eight knots an hour.
Q. What is the average consumption of coal per day?
A. She generally consumes about thirteen tons—thirteen and a half tons per day.
Q. That is, a day of twenty-four hours?
A. Yes, sir.
Q. What is the distance between Sidney, Copenhagen, to Cape Breton?

A. I don't know the exact distance.
Q. How long does it take your vessel to make it?
A. She might be twenty, sixteen, or thirteen days in making it.
Q. Have you made that trip between those two ports?
A. Never, sir.
Q. How many days' run is it from Sidney to Cork?
A. Twelve (12) days.
Q. When you say twelve days do you mean that it would take twelve days for your vessel to make it, travelling at the rate of eight knots per hour?
A. Yes, sir.
Q. If you went slower, of course, it would take longer?
A. Of course.

112 Q. When you commenced loading the Deronda in this port in June last how much coal did you have on board?
A. One hundred and seventy tons, as near as I could get at it.

Q. English tons?
A. Yes, sir.
Q. You say as near as you could get at it?
A. Yes, sir; that is what the engineer reported to me.
Q. Do you know how he made that calculation?
A. Yes, sir; he went in the bunker, I presume.
Q. Where did you take on that coal?
A. We took a part of it on board in England.
Q. Did you take any on board of her after you arrived in port here?
A. Yes, sir.
Q. How much did you take on her here?
A. One hundred and forty (140) tons.
Q. From whom did you purchase that coal?
A. From W. G. Coyle.
Q. Did you consider one hundred and seventy (170) tons a safe quantity to take your vessel from here to Sidney with?
A. Certainly.
Q. Did you not express the opinion that that was a proper quantity to take on that voyage?
A. Well, I may have done so.
Q. How many days' run is it between here and Cape City for your vessel?
A. About eleven days.
Q. Who had control of the quantity of coal which was put on the vessel; was it you?

113 A. Most certainly I have. I have control over everything.

Q. And after you came to this port you had loaded on board one hundred and forty (140) tons?
A. Yes, sir.
Q. In addition to what you had already on board?
A. Yes, sir.

Q. After you got ready to load this cargo that you took on in June was that vessel surveyed by the marine inspector?
A. Yes, sir.

Objection.—Mr. Beckwith objects to the evidence on the ground that it is a matter of certificate, which speaks for itself.

Q. There was a certificate issued, and she was pronounced ready?
A. Yes, sir.

No cross-examination.

Witness DAVID ROBSON being duly sworn as a witness on the part of libellants, and examined by J. WARD GURLEY, Jr., Esq.:

Q. What is your business?
A. Chief engineer of the steamship Deronda.
Q. How long have you been on board of the steamship Deronda?
A. A year and nine months.
Q. How many voyages have you made on her?
A. About six or so.
Q. Have you ever made a voyage from this port?
A. I have made two from this port.
Q. From here to where?
A. Liverpool, with cotton.
Q. Where was the other voyage?
114 A. I can't remember. I think we made a voyage from here to Havre. I am not quite certain.
Q. What is the average speed of this vessel?
A. Two hundred miles (200) a day.
Q. About how many knots an hour?
A. About eight and a half knots per hour. She will make that, on an average, on a long run.
Q. How much coal does she consume per day?
A. She is running with about thirteen tons. She used to get away with fourteen and a half tons per day.
Q. What is the cause of that change?
A. She has been put to a great deal of repairs. A great deal of money has been spent on her in repairing her.
Q. When was that?
A. We took advantage when she was home to make repairs on her.
Q. What was the average consumption of coal per day on her voyage down here?
A. Thirteen and a quarter (13¼) tons.
Q. Does she make eight knots or eight and a half knots per hour with thirteen and a half tons per day?
A. Yes, sir; she will make that.
Q. How much coal did she have on board when she arrived in this port in June last?
A. Sixty-five tons.
Q. How much coal did she take on after she arrived here?
A. We took one hundred and forty tons of two thousand pounds.

Q. Where did she get that coal?
A. From Coyle and Co.

Q. Mr. Robson, when the vessel was loaded on Saturday night, June 30th, 1883, was there any water in the boilers?

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A. Yes, sir; the boilers were full and ready for sea; the fires were lighted; we expected to go to sea the next morning; I was ready then to proceed.
Q. When had the water been pumped into the boilers?
A. The day before.
Q. Hadn't it been taken out during Saturday?
A. I got orders to run it out, but I found that the water was too hot and I held it in.
Q. Who gave you order to run it out?
A. Captain Eldridge.
Q. Those boilers were full all day Saturday?
A. They were full to a certain level; they were filled to their usual quantity.

United States District Court for the Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

Testimony taken on the part of libellants in the above entitled and numbered cause, on the 14th day of July, 1883, before K. Loew, Esq., United States commissioner:

Appearances: J. Ward Gurley, Esq., proctor for libellants; H. E. Upton & J. R. Beckwith, Esq., appearing *pro hoc vice* without prejudice to any right, exception, ground of defense, or irregularity in the proceedings herein, and waiving no rights of any plea, exception, or motion, and taking advantage of any error or irregularity in the proceedings herein.

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Index: George Henry Eldridge, page 2; David Robson, 4; 16 pages.

Witness GEORGE HENRY ELDRIDGE being sworn as a witness for libellants, and examined by Mr. GURLEY:

Q. Have you brought with you the log book containing the entries of the last voyage of your vessel to this port?
A. From Palermo; yes, sir.
Q. Will you please let me see it?

Witness produces the same.

Q. Captain, look at the log book and please tell me from the entries therein the rate of speed that your vessel made on that trip each day?
A. On the first day we made eight to five knots per hour.
Q. What was the consumption of coal that day?

A. That is a matter for the engineers to testify to; I don't know.

Q. What was the rate of speed on the second day?

A. Eight and a half ($8\frac{1}{2}$) and nine and a quarter ($9\frac{1}{4}$) knots per hour during the latter part of the day.

Q. Can you give us the number of miles that she ran in each day?

A. Yes, sir.

Q. How many miles did she run the first day?

A. On a twenty (20) hours' run we made eighty-seven (87) miles.

Q. You mean miles or knots?

A. Knots; nautical miles. In eighteen (18) hours she made eighty-seven (87) miles.

Q. The next day how many miles did she make?

A. The next day she made one hundred and seventy (170)
117 miles—that is, from noon of the 20th of May to noon of the 21st of May.

Q. And the next day?

A. Two hundred and twenty-one (221) miles.

Q. How many hours?

A. Twenty-four hours; I am giving you the distance she made from the noon of one day to the noon of the other; noon to noon—from noon of May 22nd to noon of May 23rd, two hundred and ten (210) miles; May 24th, two hundred and twenty-eight (228) miles; to noon of May 25th, let me see—there is nothing for that day because we went up to Gibraltar for coal; noon May 26th, in sixteen (16) hours she made one hundred and twenty-two (122) miles; noon May 27th she made two hundred and four (204) miles; May 28th, one hundred forty-four (144) miles; she made a short run on that day in consequence of being stopped and taking a steamer in tow; May 29th, we have no record for that day; she made about one hundred and twenty (120) miles altogether; we were towing that steamer and we towed her into Madeira. "May 30th" she made two hundred and twenty (220) miles in twenty-four (24) hours; "May 31st," two hundred and twenty miles; "June 1st," two hundred and thirty-two (232) miles; "June 2nd," two hundred and twenty-three (223) miles; "June 3rd," two hundred and twenty-two (222) miles; "June 4th," two hundred and twenty-one (221) miles; "June 5th," two hundred and twenty (220) miles; "June 6th," two hundred and fifteen (215) miles; "June 7th," two hundred and thirty-two (232) miles; "June 8th," two hundred and twenty-two (222) miles; June 9th, two hundred and twenty-four miles (224); "June 10th," two hundred and seventeen (217) miles; "June 11th,"
two hundred and twenty-one (221) miles; "June 12th," two
118 hundred and fourteen (214) miles; "June 13th," two hundred and eleven (211) miles; June 14th," two hundred and thirteen (213) miles; "June 15th," two hundred and fourteen (214) miles; "June 16th," two hundred and twenty (220) miles, and we got a pilot at the passes that night, and that ended the voyage.

Q. Captain, what was the mean draught of water of that vessel during that voyage?

A. Twenty feet ten inches forward and twenty-one feet four inches aft, when we left Gibraltar.

Q. Did you have occasion to cable to your owners relative to this charter, about the time, at the time, just before or just after the date of the charter?

A. No, sir; there was no cable sent in my name.

Q. Did you send any cables to the owners at all?

A. Personally, no, sir.

Q. Did you send any cables to the owners, either written by yourself or through the firm of De Wolf & Hammond and in their name?

A. No, sir; they fixed the charter party. I did not dictate or send a cable of that kind.

Q. Have you done so since?

A. No, sir.

Q. Was there any cable from you in your name or in the name of De Wolf & Hammond, dictated by you, sent to the owners?

A. No, sir; they cabled in their own name and in their own behalf, not in mine.

Q. Were you not consulted by De Wolf & Hammond relative to the same, relative to cables which they sent to the owners?

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A. Certainly.

Q. Do you know what cables were sent by DeWolf & Hammond — consultation with you?

A. I would recognize them if I would see them and read them; I don't remember them word for word.

Cross-examination by Mr. UPTON:

Q. What quantity of coal has your vessel on board at present?

Objection.—Mr. Gurley, proctor for libellants, objects to the question and evidence on the subject as being entirely irrelevant.

A. I suppose about one hundred and forty (140) tons; I don't swear to that at all.

Q. Well, you have about one hundred and forty (140) tons on board now?

A. Yes, sir; about that.

Q. Can you state about the length of time it would take your vessel to go from here to Newport News?

Objection.—Mr. Gurley, proctor for libellants, objects to the question and evidence on the subject on the ground that it is irrelevant.

A. About six days.

Q. What cargo have you on board of your vessel at present.

A. Ten thousand quarters of maize.

Objection.—Mr. Gurley, proctor for libellants, objects to the whole of the cross-examination as being irrelevant and having no effect upon the charterers, as the terms and conditions of that charter were broken and the rights of the parties were fixed at the date of the

seizure, and any changes which may have taken place on the
120 vessel or relative to the cargo after that time has no place in this suit.

Q. And in addition thereto I understand you to say that you have about one hundred and forty (140) tons of coal on board?

A. Yes, sir; about one hundred and forty tons.

Q. Before clearing your vessel do you expect taking on any additional coal? If so, state how much.

A. No, sir; I have got all the coal I want now.

Q. What is the draft of that vessel at present?

A. Twenty-one feet two inches forward and twenty-one and a half ($21\frac{1}{2}$) feet aft.

Q. What free board?

A. Four feet nine inches in fresh water.

Q. And in salt water what would that be?

A. That would give her by the time we got over the Passes five feet three inches; there may be an inch difference in free board between my estimate and that of the surveyors; she was loaded according to the instructions of the surveyors.

Objection.—Mr. Gurley, proctor for libellants, objects to the evidence on the ground that the cross-examination of the witness is not a legitimate cross-examination, but is an examination of the witness upon other subjects than those which he has been questioned upon the direct examination, and therefore the witness is being examined as a witness for claimants instead of being cross-examined as a witness for libellants.

Q. You have detailed in your examination-in-chief the number of miles that your vessel made on each day of her last voyage; now, will you please state if on any one day of twenty-four hours dur-
ing that voyage she made less than two hundred (200)
121 miles? State what — average time was per day during that voyage.

A. There was one or two days during which we did not make two hundred miles a day. She certainly averaged over two hundred miles a day; there is no doubt about that.

Witness DAVID ROBSON having been duly sworn as a witness for libellants, and examined by Mr. GURLEY:

Q. Mr. Robson, look at that paper which I hand you, which is an extract of the log book of the steamship Nicasian, and tell me whether you have made a return or report similar in form to that to the owners of your ship.

A. No, sir; I have not made a report similar to that, but I signed and sent a coal report every voyage; it is something like this one; something similar to this.

Q. Have you sent in your coal report for the last voyage to this port?

A. I don't send any coal report until we arrive in England again.

Q. Have you made it out yet?
A. I don't make it out until we arrive in England again.

Cross-examination by Mr. UPTON:

Q. Will you please state the quantity of coal on board of the steamship Deronda at present?
A. There is about one hundred and thirty-four (134) tons, sir.
Q. Don't you know the exact quantity of coal there is on board?
A. I say there is one hundred and thirty-four tons, as near as it is possible to reckon it.
Q. Do you know the number of days that it will take your vessel to go from here to Newport News?

122 Objection.—Mr. Gurley, proctor for libellants, objects to the question and evidence on the ground that it is irrelevant, and also reserves the same objections as were urged against the testimony given by Captain Eldidge this day on the cross-examination.

A. No, sir; I don't know.
Q. You are satisfied that the vessel now has at least one hundred and thirty-four (134) tons of coal on board?
A. Yes, sir; that is the quantity she has now on board.

United States District Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

Testimony taken on behalf of libellants before John Devonshire, United States commissioner, this 29th November, 1883.

Present: J. Ward Gurley, Jr., Esq., for the libellants; James McConnell and J. R. Beckwith, Esqrs., for the respondents.

B. F. BANGSTON, sworn for the libellants, says:

By Mr. GURLEY:

Q. What is your business?
A. The grain export business.
Q. Had you ever any contract with Gomila & Co. for a cargo for June shipment?

Mr. Beckwith objects to the question as irrelevant to the issues in this case.

A. Yes, sir.
Q. Are you a member of the firm of E. Forestier & Co.?
123 A. Yes, sir.
Q. Was the contract made with you or with the firm of E. Forestier & Co.?
A. Yes, sir.

Q. Was the contract made with you or with the firm of E. Forestier & Co.?

A. It was made with E. Forestier & Co.

Q. Have you a copy of that contract?

A. Yes, sir; I have the original.

Mr. Gurley offers in evidence the contract referred to, marked here "Bangston No. 1."

Messrs. McConnell and Beckwith object to the introduction of the contract as being *res inter alias acta* and as being upon its face an incomplete document, not being accepted by the purchasers.

Q. Was there any shipment made at the time of the making of that contract *as* the vessel to carry that cargo?

Objection is now made by the respondents to all the testimony of this witness on the subject of the contract of sale to him by Gomila & Co. of corn on the grounds above stated, without the necessity of further repetition, and to all testimony relative to the shipment.

A. Yes, sir.

Q. Was any vessel designated to you at any other time?

A. Yes, sir; later on.

Q. What vessel?

A. The steamship Deronda.

Q. When?

A. Well, I cannot tell you; it must be at the end of June, 1883.

124 Q. What date of June—the last week or the last few days, or what?

A. It was a June shipment; it was within the last ten days of June, 1883.

Q. Was there any transfer of the charter party of that vessel made by you — E. Forestier & Co.?

A. No, sir; there was no transfer made.

A. Was any charter party of any vessel shown to you by Gomila & Co.?

A. Not before the contract Mr. Gomila made with me was carried out.

Q. What do you mean by "carried out?"

A. I mean that as long as my contract was not filled I had not to care about the name of the vesel nor the charter party either.

Q. Did you have a charter party put into your hands by Gomila & Co. of any vessel?

A. When the Deronda was loading; yes, sir.

Q. What charter party did you have put into your hands?

A. It was the steamship Deronda?

Q. From whom did you get that charter party?

A. A few days before the steamship was loaded I got it from Mr. Gomila.

Q. Was that charter party endorsed by Mr. Gomila?

A. No, sir; it was not endorsed.

Mr. McConnell calls for the production of the charter party that the witness refers to and objects to his testimony here as secondary evidence.

Q. What did you do with that charter party?
A. Well, this charter party I took down to De Wolf & Hammond's office to have the charterer's name changed from Mr. Gomila to E. Forestier & Co., as we usually do.
125 Q. Whom did you leave it with?
A. With Mr. De Wolf.
Q. Did you get it back?
A. I got it back in our name, E. Forestier & Co.; not the same charter party, but another charter party.
Q. Was there any change in that charter party excepting the change of your name?

Messrs. McConnell and Beckwith object on the ground that the charter party speaks for itself; it is the best evidence, and they call for the production of it.

A. No, sir.
Q. Have you got the second copy of this charter party?
A. I believe I have.
Q. Have you got it with you?
A. No, sir.
Q. I wish you would produce the copy that you have got.
A. Yes, sir; I will look after it.
Q. What became of the first copy that you left with De Wolf & Hammond in the name of Gomila & Co.?
A. Mr. De Wolf kept it.
Q. Did you apply for it?
A. Yes, sir.
Q. Did you ever get it?
A. He never gave it to me.
Q. Why?
A. I had no reason to ask any more about it, because I had my charter party made out in our name; therefore I had no other reason to demand it, although I asked for it.
Q. What took place between you and De Wolf & Ham-
126 mond relative to the making out of this new copy of the charter party?
A. I said to Mr. De Wolf, "Please change the name, because I do not want to show to my customers the name of Gomila & Co. as the charterers. I want to show my name on the original—on the whole shipment of the cargo." That is the reason the name was changed.
Q. That is, you wanted your buyers to know that you did your own chartering?
A. Yes, sir; as I have done with other brokers here.
Q. What did De Wolf & Hammond state about it?
A. Well, they had no objection to it.
Q. Did Mr. Gomila ever know or consent to this change?
A. No, sir; Mr. Gomila did not know it.

Q. It was a private arrangement, then, between you and Mr De Wolf?

Mr. McConnell objects to the question as leading.

A. Yes, sir; as I always do with other brokers.
Q. Mr. Gomila was not there?
A. No, sir; he was not present.
Q. Did Mr. Gomila comply with his contract with you?
A. No, sir; he did not.
Q. Why?
A. The steamer, which, according to my contract, ought to take not less than ten thousand quarters, did not take the quantity stipulated; that is the reason.
Q. What did you do about that?
A. As soon as the ship did not cary the quantity stipulated I had to refuse the whole cargo, because my customers objected to the reduced quantity. As they refused the quantity from me, I had to refuse it from Mr. Gomila.

Q. Did you use any effort to settle this matter; if so, with
127 whom, and what effort?

A. Well, I remember that I offered to Mr. De Wolf to take the cargo with the reduction, which was refused by him.
Q. What reduction?

Respondents object to the question as irrelevant under the pleading.

A. I do not remember now.
Q. Did you offer this cargo to De Wolf & Hammond then for their owners?
A. Yes, sir; I did.
Q. At what price?

Same objection as before.

A. I do not remember now.
Q. Was it at the same price at which you sold it to your buyers or less?
A. It was much less price.
Q. And they refused it?
A. Yes, sir; they refused it.
Q. Did you act in this matter for yourself, E. Forestier & Co., or for Mr. Gomila, or by his instructions, or for both?
A. Mr. Gomila was going away and he told me to act for the best—to try and place the cargo on the other side on the best terms that I could.
Q. Did Gomila & Co. ask you to make an offer to De Wolf & Hammond to take it off your hands at the same price at which you sold it to the buyers on the other side?

Same objection as before.

A. Yes, sir.

Q. At what price did you sell that cargo, originally?

128 A. It was £1.8.1½ per quarter of four hundred and eighty pounds.

Q. Was that sale in writing?

A. Yes, sir; I have it in writing.

Respondents object to the above testimony because the sale, being in writing, is the best evidence.

Q. Will you please produce the sale?

A. Yes, sir; I will.

Q. Have you got your cables also relative to this matter?

A. Yes, sir.

Q. You will please produce them all.

A. Yes, sir.

Q. Did Mr. Gomila pay you the loss you sustained by reason of the non-fulfillment of your contract?

Respondents object as it is *res inter alias acta.*

A. Yes, sir.

Q. How much did he pay you?

A. He paid me 3,194.29.

Q. Look at this check marked "Bangston No. 2" and state if you ever saw that before.

A. Yes, sir; I did.

Q. What is it?

A. It is the check that Mr. Gomila gave us for the non-fulfillment of the contract.

Q. How much is that check for?

A. $3,194.29.

Q. What does that account represent?

A. That is the amount of my commissions I claim from the other side.

129 Q. Have you ever had contracts of this kind before?

A. Yes, sir; I have had several.

Q. Have you ever had losses before?

A. As soon as the contract made between Mr. Gomila and me did not come up to the conditions he had to pay the difference, whatever it was.

Q. Then you have had transactions of this kind before with Mr. Gomila?

A. It happened sometimes that the contract did not come up to the conditions made originally.

Q. Have you ever collected losses before on contracts of this kind?

A. Yes, sir.

Q. From Gomila and Co.?

A. Yes, sir.

Q. Upon what rate or terms?

Same objection as above.

A. Well, that as long as he did not carry out his contract I was to claim my commission.

Q. What rate did he settle at; what did you charge him for?

A. My commissions here.

Q. Did you charge him with the difference in price?

A. The difference in price and sometimes with my commissions.

Q. You will produce all those cables and letters from the other side and letters to Mr. Gomila.

A. Yes, sir.

130 Cross-examined by Mr. CONNELL:

Q. How many members are there in the firm of E. Forestier & Co.?

A. Two.

Q. Who is the other member?

A. Mr. E. Forestier.

Q. Was he at that time in this city?

A. No, sir; he was not here; he was in Europe.

Q. You were the sole member of the firm, then, here?

A. Yes, sir.

Q. You were the sole one, then, in connection with that firm that had any business with this transaction?

A. Yes, sir.

Q. You said that the charter party which you got from M. Gomila you took to Mr. De Wolf?

A. Yes, sir.

Q. In order that you might let the parties that dealt with you see that you had the charter party yourself in your own name?

A. Yes, sir.

Q. That was your motive?

A. Yes, sir.

Q. And therefore you surrendered the charter party that you took to Mr. De Wolf, who gave you another and different paper?

A. Yes, sir; exactly.

Q. What was the date at which you took that charter party to Mr. De Wolf; a few days before the steamer was loaded? I cannot say exactly the date; it must be about the 28th; the 28th of what month—June?

131 A. Yes, sir.

Q. Have you anything by which you can fix that date positive and certain?

A. No, sir; I have not.

Q. Have you not got some entry in your books that will show the date of that transaction, when you got that charter party from De Wolf & Hammond?

A. No, sir; I never noticed that. I never wrote down when I took the charter party, but my books can show that contract marked Bangston No. 1.

Q. What were the names of the parties in Europe to whom you had sold this grain?

A. Stekkebrye & Hiralsoe, of Copenhagen.
Q. Is your contract with them in writing?
A. Yes, sir; by letter and cable.
Q. Will you produce it?
A. Yes, sir.
Q. What was the date of that cable and the date of that letter that you refer to as to changing that contract?
A. I cannot recollect now.
Q. Well, about as near as you can recollect it.
A. At the beginning of June, I believe; I must see my papers first.
Q. Was it before or after the date of your contract that you put in evidence?
A. That is the same date as the contract marked Bangston No. 1, June 7th, but I would prefer to show you my letter. It must be about the 7th or 8th.
Q. Will you produce both the telegram and the letter?
132 A. Yes, sir.
Q. The letter that you refer to—was it one that they wrote to you?
A. Yes, sir.
Q. What was the quantity of corn mentioned in that letter that you sold to that house?
A. Ten thousand quarters; either ten thousand or from ten to twelve thousand.
Q. What kind of corn?
A. What we call A No. 2—mixed corn.
Q. At what price were you to sell that corn for; what was the price agreed upon?
A. £1.8.2½ (sterling).
Q. Were these all the conditions mentioned in your sale to that house?
A. The shipment to be made such and such a time.
Q. What time?
A. June loading. It was exactly on the same conditions as this Bangston No. 1.
Q. If it was the same conditions as in the contract made with Gomila & Co. how is it that you cannot recollect the date of it or before or after?
A. Well, possibly it was not exactly the same date, but both were from Mr. Gomila; perhaps it may be one or ten days afterwards.
Q. Which contract did you make first—the contract with Gomila & Co. or the contract with Stekkebrye & Hiralsoe, of Copenhagen?
A. The contract with Mr. Gomila was made on an order from the other side. With that order I went down to Mr. Gomila and asked
133 him if he was willing to sell me on those conditions. My contract on the other side was the consequence of that contract marked Bangston No. 1—the contract with Mr. Gomila.
Q. You made the contract with Gomila & Co. first?
A. Yes, sir. You asked me if this contract was made first before I made it on the other side, and I state that on the cable receipt

from the other side I went down to Mr. Gomila and asked him if he was willing to sell me on these conditions, and he said yes, and then the contract was made.

By Mr. BECKWITH:

Q. Did you make this contract with Gomila & Co., as shown in the document Bangston No. 1, for yourself, as principal, or for the firm of Stekkebrye & Hiralsoe, of Copenhagen, as principal?

A. For myself as principal.

Q. How much money have you remitted to Stekkebrye & Hiralsoe, of Copenhagen?

A. Well, I must see my books first.

Q. Did you remit them any money on account of this contract? Yes or no.

A. Well, I must say no, sir.

Q. Then you have never remitted to them any portion of this $3,194.29 which you say Mr. Gomila paid you?

A. No, sir; I never done so.

Q. Why have you not done so?

A. Because they have no right to claim it.

Q. And they have never made any claim on you for it?

A. No, sir.

Q. Then you did not sustain any loss, did you, to them?

A. No, sir; not to them.

Q. If you did not sustain any loss to them and you give
134 their names as the purchasers of this corn from you at a certain price, through whom did you sustain loss?

A. I have lost because Mr. Gomila did not carry out his contract.

Q. You say that a part of that $3,194.29 paid to you by Mr. Gomila was for commissions here?

A. It is all commissions here.

Q. It was all your commissions here?

A. Yes, sir.

Q. Your commissions here on what?

A. On the contract.

Q. Explain that. On what contract?

A. On ten thousand quarters. Mr. Gomila owed me ten thousand quarters on such and such conditions and he did not carry out his contract. Then I could not get my commissions and I claimed them from him; that is the difference in price between here and the other side.

Q. You state that you sold some grain to Stekkebrye & Hiralsoe, of Copenhagen?

A. Yes, sir.

Q. At how much a quarter?

A. £1.8.1½ per quarter.

Q. And you did not deliver it to them?

A. No, sir.

Q. And they never made any complaint to you because you did not deliver it to them?

A. No, sir.

Q. Was that free of freight—your contract with them?

135 A. Cost, freight, and insurance we call it in commercial terms—cost, freight, and insurance. That is what the stuff cost, plus freight and iusurance.

Q. Corn went down in price?

A. Certainly; yes, sir; very heavily, too; but I could not lose my commissions for that. If Mr. Gomila could not carry out his contract I should not lose my commission.

Q. Do you remember what the fall in price of corn was during the month of June, or between the 7th and the 30th of June?

A. It must be two shillings sterling per quarter.

Q. Between the 7th and the 30th of June?

A. Yes, sir. Well, I cannot tell you the exact date, but when the cargo was loaded I remember it was very much down.

Q. Who furnished this cargo to the Deronda?

A. Gomila.

Q. Did you not furnish it?

A. No, sir. Mr. Gomila, being the seller to me free on board, he had to put it on board.

Q. Did you not attend to the loading of the ship in any way?

A. The only supervision I had was about the weight.

Q. You said that the vessel did not carry the ten thousand quarters?

A. Yes, sir; I did.

Q. Did she not go away from this port with the ten thousand quarters in her?

Mr. Gurley objects to this question on the ground that it is a matter of no moment, so far as this issue is concerned, whether the

136 vessel left at a subsequent period with any given quantity of cargo; the only question at issue is, Did it fill this contract and leave this port at the time contemplated by the charter with the necessary cargo?

A. Yes, sir; she did. When the shipment ought to be done, the 30th of June, she had not the quantity stipulated by my contract, and after that she had some other things which I had nothing to do with.

Q. But after that did she have the quantity?

A. I believe so.

Q. And went away with the stipulated quantity?

A. I believe so. I had nothing more to do with the steamer when she did not come up to my contract; I refused her.

Q. It was your contract that the steamer was loaded under?

A. Yes, sir.

Q. Did she not go away from this port with the same corn on her that was put on her under your contract?

A. The same corn; yes, sir.

Q. It was not taken out of her and somebody else's corn put in?

A. No, sir.

Q. And therefore she went away from here loaded under your contract?

A. No, sir; not on the original contract.

Q. Under your contract?

A. No, sir; not under my contract.

Q. Under whose contract was she loaded when she went away from this port?

A. That is entirely different from this contract.

Q. What contract was it? She was loaded under your
137 contract up to within a small quantity?

A. Yes, sir.

Q. And she went away from here with all that corn that you put in?

A. Yes, sir.

Q. The only difference being that after the 30th of June the balance was put in her and she went away with that?

A. Yes, sir.

Q. Do you know what time she sailed away from this port?

A. It must be between the 15th and the 20th of July.

Q. Do you know that she sailed about that time?

A. Yes, sir.

Q. And she delivered her cargo on the other side?

A. Yes, sir.

Q. You have advices from the other side that she arrived there safely?

A. Yes, sir; that she arrived, but not safely. She stranded when she got into port on the other side.

Q. But she got there and delivered her cargo?

A. Yes, sir.

Q. How long a time elapsed between the time you took that charter party first to Mr. De Wolf and then returned and got another one, which, you say, was an entirely different charter party and another distinct paper, as you also say?

A. He made the substitute the same day.

Q. Did you remain there in the office during the time it was being done?

A. No, sir.

138 Q. You went to your office?

A. Yes, sir.

Q. And you returned to their office and then he delivered it to you?

A. Yes, sir; or he sent it to my office; I don't know which.

Q. Did you get the charter party the same day from Mr. Gomila that you went to De Wolf & Hammond's office with it?

A. Yes, sir.

Q. Who had given you that charter party; was it Mr. Gomila himself?

A. Mr. Gomila himself.

Q. What did he give it to you for—to do what with it?

A. Because I had to have all the documents ready to send them to the bankers who had bought my exchange.

Q. What bankers bought your exchange, the Citizen's Bank or A. Carriere & Co.?

A. Well, I cannot recollect; but I can show you at the office the broker's exchange contract.

Q. Can you not remember what bank it was that bought your exchange on that shipment?

A. No, sir; I sold the exchange to three or four bankers and I cannot recollect who bought it.

Q. How much was paid you on that exchange?

A. I will have to see my exchange contract.

Q. Well, about how much?

A. About four hundred and eighty-three or four hundred and eighty-four—sixty days.

Q. What amount?

A. Fifty or sixty thousand dollars.

139 Q. And you cannot recollect now what banker it was?

A. No, sir; I can produce you my broker's exchange book.

Q. What became of that bill of exchange?

A. I refused the cargo.

Q. You say that you went to the bankers and sold a bill of exchange, if I understand you?

A. Let me explain. As soon as I sold the cargo I went to the bankers and sold exchange.

Q. You did that?

A. Yes, sir.

Q. What was the amount that you sold?

A. $50,000 or $60,000. I would have to produce my exchange broker's contract.

Q. Was not that A. Carriere & Son?

A. I cannot remember that. I will show you the bill by which I sold it to the bankers.

Q. You got a bill of exchange for $50,000 or $60,000. What became of that bill? Did it go forward?

A. Yes, sir; it did.

Q. Was it honored?

A. Yes, sir.

Q. Who was it drawn on?

A. Hambro & Son, London.

Q. Who paid that bill on the other side?

A. The same parties.

Q. How did they get in funds?

A. I don't know.

140 Q. Was that bill ultimately paid out of the proceeds of any cargo of corn?

A. Well, I do not understand your question. I don't know how they did on the other side.

Q. You drew that bill, and somebody had to pay it?

A. Yes, sir; the bankers paid it.

Q. Who paid the bankers?

A. Well, I suppose these people, Stekkebrye & Hiralsoe.

Q. How did they get in funds?

A. I don't know. I draw on the bankers in London. That is not my business.

Q. Did they have any notice of this bill?

A. No, sir.

Q. Did this firm of Stekkebrye & Hiralsoe, in Copenhagen, ever ask you to make this bill?

A. No, sir.

Q. Then you got $60,000 for nothing?

A. No, sir.

Q. You did not send forward the grain, and you sent forward the bill of exchange?

A. I don't understand you. I tell you frankly I don't know what you mean. When I drew afterwards on the cargo I got the money from the bankers, and with this money I paid Mr. Gomila, so I had not any money.

Q. The bill that you drew before you bursted this contract was sent forward and collected?

Mr. Gurley objects to the above, as it purports to put words in the mouth of the witness.

141 Q. You had drawn this bill for $50,000 or $60,000 and got the money on it before you condemned Mr. Gomila to pay you?

A. No, sir; never.

Q. Then you never drew the bill?

A. I never received money until I forwarded the cargo.

Q. Now, you drew a bill of $50,000 or $60,000 against this firm in Copenhagen and pledged the documents of this cargo to secure the bill?

A. Yes, sir.

Q. That bill went forward and was paid?

A. Yes, sir.

Q. Then you are $50,000 or $60,000 ahead?

A. No, sir; I am not.

Q. Because the cargo did not go forward?

A. Afterwards.

Q. Was this bill on Stekkebrye & Hiralsoe, of Copenhagen, paid ultimately out of the proceeds of the cargo of the Deronda that did go forward?

A. No, sir; it was not.

Q. Then you made $50,000 by sending the bill forward with collateral that did not represent the cargo?

A. No, sir; because there was a difference in the price between the first price and the second price that the cargo sold for. Then when we remitted the difference they took up the documents.

Q. Did this firm of Stekkebrye & Hiralsoe, of Copenhagen, take the cargo of the Deronda when it reached Copenhagen?

A. They did, with the difference in price.

142 Q. Were any new bills drawn?

A. No, sir; no new bills.

Q. Then this cargo of the Deronda went forward to the same men that you were corresponding with when you made this contract with Gomila & Co.?

A. Yes, sir; afterwards.

Q. And there were ten thousand quarters of it?

A. Yes, sir.

Q. The quantity was correct?

A. They took the cargo afterwards.

Q. Then this arrangement was between you and Gomila & Co. to make a forfeiture of the commissions, let the cargo go forward, and let the proceeds of the cargo pay the draft that was originally drawn by you?

A. I do not understand that question.

Q. Now, who was the shipper and held the documents for the cargo that really did go forward on the Deronda?

A. Finally we rebought the cargo and sent off the documents.

Q. When did you rebuy the cargo?

A. After the auction.

Q. Then that auction was part of the arrangement also?

A. Well, that is not my business.

Q. Who bought the charter party?

A. We bought the cargo at auction.

Q. Who bought the cargo at——

A. A. Carriere.

Q. Did he pay the draft then that you had drawn?

A. We paid it after all.

143 Q. Yes; because he was the holder of it?

A. Yes, sir.

Q. And this arrangement was to secure him for the draft you had already given him?

A. No, sir; there was no draft drawn at all. I had not drawn anything on the 30th of June.

Q. But you were making arrangements to do so with Mr. Carriere?

A. Yes, sir; afterwards when I rebought the cargo.

Q. You said the documents or charter party from Gomila to deliver to the man who had bought your bills, or the bank. I presume that when you called for the charter party you had sold the exchange?

A. Yes, sir.

Q. Well, that was before the auction sale?

A. It was the same time.

Q. Now, is it not true that there was an arrangement between you and Mr. Gomila and whoever held the bills that you had drawn that you should go through this scheme, or private auction sale, and let the cargo forward to cover the bills that you had already drawn?

A. No, sir; because there was no bill already drawn.

Q. What, did you want a charter party then, at the time you surrendered it to De Wolf & Hammond as collateral security for a bill, if no bill had been drawn?

A. Because on the 30th June I thought the contract was all right,

Q. How did they get in funds?

A. I don't know. I draw on the bankers in London. That is not my business.

Q. Did they have any notice of this bill?

A. No, sir.

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A. No, sir; because there was no bill already drawn.

Q. What, did you want a charter party then, at the time you surrendered it to De Wolf & Hammond as collateral security for a bill, if no bill had been drawn?

A. Because on the 30th June I thought the contract was all right,

and therefore a few days afterwards I asked Mr. Gomila for the charter party.

Q. On the 30th June you were the charterer of the ship yourself?

144 A. I was not.

Q. Then, in your opinion, this contract between the ship and you, and that you were the charterer of it, is not any account?

A. There could not be such an understanding, because my charter party was in the name of E. Forestier & Co., and was exactly of the same date as the first original, made in the name of Mr. Gomila.

Q. There were not two charter parties out, one to you and the other to Gomila & Co.?

A. No, sir; the original was given to Mr. De Wolf.

Q. Do I understand you to say that it is your opinion of law and fact that after you delivered up the charter party of Gomila & Co. to De Wolf & Hammond, the agents of the ship, and they, at your request, had cancelled that charter party and given you a charter party of the same ship to you in your name, that you were not the charterer of that ship?

Mr. Gurley objects on the ground, first, that it is the province of the court and not of the witness to give an opinion as to the law; second, because the question is so framed that from the imperfect knowledge of the English language by the witness it is impossible for him to understand it.

A. No, sir.

Q. Who, then, had the charter of that ship?

A. The original charter party was left in the hands of De Wolf & Hammond, and what they did with it I don't know.

Q. Did you believe or expect for a moment that De Wolf & Hammond, with an existing charter party out to Gomila & Co., would give a charter party for the same voyage to you?

145 A. Well, he gave it to me. He got the original charter party of Gomila & Co. and gave me another one.

Q. That did not make you the charterer of the ship at all?

A. No, sir; that it can never do, because there was only a substitution of the names.

Q. That is the difference between two men's promissory notes. If I promise to pay $10,000 and sign my name to it I will have to pay it, and if you sign it you still say it is my obligation.

A. Well, in my opinion it is not.

By Mr. McConnell:

Q. You wanted your buyer to think it was your charter party?

A. Yes, sir.

Q. And therefore you wanted all documents made out in your name?

A. Yes, sir; in the name of E. Forestier & Co.

By Mr. BECKWITH:

Q. Did Mr. Gomila know you were going to do that?

A. No, sir; he never did before.

Q. When did he first know it?

A. I don't know.

Q. You knew this was the ship upon which this grain was to go forward?

A. Not when I made this contract.

Q. But when you surrendered the charter party?

A. Yes, sir; then first it was that I knew it.

Q. And it was after you had taken this charter party in your own name that you made this claim for damages against Gomila & Co.?

A. Yes, sir.

Q. Now, at what precise date did you and Gomila & Co. agree and settle upon the amount of money that he was to pay you?

146 A. Well, my statement will show that.

Q. You cannot state?

A. No, sir.

Q. Was it the date the check was given?

A. Yes, sir.

Q. That appears to be the 7th of July, 1883; it was that date that you settled?

A. Yes, sir. Well, the best is to see the statement. The check can be paid after the statement is made out.

Q. Do you think it was the same date that he gave you the check?

A. Yes, sir; the first letter we wrote to Gomila & Co. was on the 5th of July.

Q. When did you finally settle this matter; was it on the date of the check?

A. Yes, sir; it must be so.

Q. Who held the bills of lading and the charter party under which the Deronda carried her cargo and delivered it?

A. I turned it over to Mr. Gomila when they received the cargo—returned all documents.

Q. But I ask you who held the bills and the copy of the charter party under which the Deronda completed the voyage and delivered her cargo?

A. Finally, when she completed it?

Q. Yes.

A. Well, we were the final persons, after all.

Q. Did you attach these bills to some draft?

A. Yes, sir.

Q. Did you attach any copy of the charter party to that draft?

147 A. Yes, sir; always.

Q. Did you not attach to that draft a copy of the charter party that you got for De Wolf & Hammond?

A. Yes, sir.

Q. Did Mr. Gomila send that vessel forward, or you?

A. We rebought the cargo and then it was ours.

Q. Just at what minute did Gomila & Co. cease to be the charterers of that ship and you became the charterers of that ship?

A. You know that, in my opinion, I was not the charterer of it.

Q. In your opinion, even after it went forward, and although you attached your charter party to the bill of exchange, you were not the charterer of the vessel?

A. No, sir; you could have bought the cargo yourself, and then you would be the charterer.

Q. Then you attached to that bill of exchange a charter which you did not own, nor that Mr. Gomila owned either?

A. The name was substituted.

Q. The name does not make any difference in a charter party?

A. Yes, sir; it does.

Q. Who owned that charter party; Mr. Gomila did not?

A. When Mr. Gomila did not do his contract I had nothing to do with the charter party.

Q. You sent her forward afterwards?

A. Yes, sir.

Q. Under what charter party?

A. The same charter party given to me by Mr. De Wolf & Hammond before the steamer was loaded served all the time.

Q. I will ask you if you have any correspondence with
148 either your bankers or with this firm of Stekkebrye & Hiralsoe, of Copenhagen, relative to the cargo that really did go forward in the Deronda?

A. Yes, sir; Mr. Forestier himself was in Copenhagen when the rebuying was ended.

Q. I do not ask you about the rebuying. I ask you if you have any correspondence and statements of account or anything relative to the cargo that did go forward after you say you bought it.

A. I believe I can produce them.

Q. Will you produce all of the correspondence?

A. Yes, sir.

Q. Have you got any account of the grain delivered?

A. No, sir.

Q. Did you get any more commissions?

A. No, sir.

Q. Whatever commissions you got from Mr. Miller—answer for the entire cargo—the consignees never paid you commissions at all?

A. No, sir.

Q. Did you ever receive any commissions upon the cargo of the Deronda other than the commissions you got from Mr. Gomila?

A. I believe so; I cannot see about it.

Q. Is it not true that you got another set of commissions out of Stekkebrye & Hiralsoe, of Copenhagen?

A. I must see about it in my books.

Q. What is your impression; did you or did you not?

A. I believe I did.

Q. What amount?

149 A. Well, I must see that.

Q. About what amount?

A. I cannot say. I must see about it.

Q. Have you ever returned to Gomila & Co., or to anybody for them, any portion of the commissions you see is represented by the check marked "Bangston No. 2?"

A. No, sir; none.

Q. Do you know — or have you received from Stekkebrye & Hiralsoe, of Copenhagen, a statement of the exact amount of corn delivered by the Deronda?

A. No, sir; because as soon as a steamer gets into accident I have nothing to do with the steamer, and therefore they need not give me any account about the cargo.

Q. How do you know she got into an accident?

A. Because I saw it in the paper.

Q. Have you any correspondence about it?

A. No, sir.

Q. Have you ever drawn on Stekkebrye & Hiralsoe, of Copenhagen, or their bankers for any commission?

A. No, sir,

Q. Did you take or reserve any commission out of this $50,000 or $60,000 draft?

A. That is what I tell you I must see what I have done about it.

Q. Do you know how long a voyage this vessel had in getting there?

A. No, sir; I don't recollect exactly.

Q. Do you know or will your correspondence show when the corn was delivered to Stekkebrye & Hiralsoe, at Copenhagen?

A. No, sir.

150 Q. Has there been any reclamations made on you by Stekkebrye & Hiralsoe?

A. No, sir.

Q. Do you know of any reclamations made upon the ship?

A. No, sir.

By Mr. McConnell:

Q. Did you make any effort to get another ship in this port on the 30th of June?

A. No, sir.

Q. Was there any other ship in this port that you could get besides the Deronda going to Copenhagen?

A. I don't believe so.

Q. That is, you believe there was not another?

A. No, sir.

Q. There were plenty of other ships in this port, other steamers, going to Europe, but none going to Copenhagen?

A. Well, I do not think there was any. In fact, I do not remember.

By Mr. Beckwith:

Q. Did you make any new contract with Stekkebrye & Hiralsoe, of Copenhagen, for this grain after you say you bought it?

A. Yes, sir.

Q. What was that?
A. On another basis.
Q. What other basis—price or quantity?
A. Price.
Q. Had you not the cargo to deliver them ten thousand quarters on that ship?
A. Then they knew there were ten thousand quarters on it.
Q. But in your last contract it was for ten thousand quarters?
151 A. Yes, sir.
Q. You complied with that contract?
A. Yes, sir.

By Mr. McConnell:

Q. You say you rebought the cargo?
A. Yes, sir.
Q. From whom?
A. From J. B. Camors.
Q. How much did you pay him for it?
A. I will have to see that from my books.
Q. Could you not tell without looking at your books?
A. Yes, sir.
Q. Was your contract with him in writing?
A. No, sir.
Q. It is entered in your books, then?
A. No, sir; it is not on the books.
Q. Give me the particulars of that contract with J. B. Camors.
A. Well, he sold me the cargo.
Q. How much did he sell you and at what rates—all the particulars?
A. I don't remember now.
Q. It was all verbal—nothing in writing?
A. No, sir; it was all verbal.
Q. All your other acts with these parties are in writing excepting this with J. B. Camors?
A. Yes, sir.
Q. What did you buy from J. B. Camors?
A. The cargo of the Deronda.
Q. Is that all?
A. Yes, sir.
152 Q. Nothing else?
A. Nothing else.

By Mr. Beckwith:

Q. Did you buy this cargo for a lump sum?
A. No, sir; I believe the price was so many cents a bushel.
Q. That was all he sold you?
A. Yes, sir.
Q. Did you pay for it in a check?
A. Yes, sir.

Q. That was in writing, was it not?
A. Yes, sir.
Q. On what bank?
A. I do not remember that; I would have to see about it.
Q. Have you got the check?
A. I will have to see about it.
Q. What was about the amount of the check?
A. I do not remember.
Q. Did you draw that check against the proceeds of the $50,000 or $60,000 draft?
A. No, sir.
Q. Will you produce that check?
A. Yes, sir.
Q. You can produce it?
A. Yes, sir.

By Mr. McConnell:

Q. You can see what bank it was on, and the amount and what date you gave it?
A. Yes, sir.
Q. And whether it was paid or not?
A. Yes, sir.
153 Q. Could you not tell what the amount was within $25,000 or anything of that kind?
A. No, sir.

By Mr. Beckwith:

Q. Did you pay for that grain out of the proceeds of the $50,000 or $60,000 draft that you drew against that cargo?
A. I never drew $50,000 or $60,000.
Q. You drew some draft?
A. Yes, sir.
Q. You told us awhile ago that it was $50,000 or $60,000?
A. Yes, sir; that I sold exchange; not what I drew.
Q. You had to draw to get the exchange?
A. Yes, sir.
Q. Did you sell it out of the proceeds of that exchange?
A. Yes, sir.
Q. You drew it out of the proceeds of this exchange?
A. Yes, sir.

The cross-examination of the witness is suspended until he produces the documents referred to in his examination and which he has promised to produce.

By Mr. Gurley:

Q. Relative to this exchange, when did you actually draw that exchange on the cargo of the Deronda for the June shipment?
A. I never drew that.

Q. Why did you not draw it?

A. Because the cargo was refused and I could not draw it; I was not authorized to draw it.

154 Q. Then the sale that you made of that exchange, or the agreement for the sale of that exchange, was never delivered?

A. No, sir; never delivered.

Q. With the failure of the vessel to load the ten thousand quarters it fell to the ground—the agreement about the exchange?

A. Yes, sir.

Q. The draft, then, which you actually did draw was drawn when, or about when?

A. About the 10th or 12th of July.

Q. Upon what was that draft based?

A. Based on the price I sold on the other side.

Q. Was that the first or second sale?

A. The second sale.

Q. At what price did you make that second sale?

A. Well, I will have to see that; I believe it was twenty-five shillings and six pence; but I am not sure of that.

Q. When you speak of your commissions what do you mean; do you mean the difference in the price, or explain what you do mean?

Q. By commissions I mean the difference of the price from Mr. Gomila, and I have to add all the insurance and expenses incurred on the risk of the voyage and my commissions. That makes the difference between his price and my price on the other side.

Q. Then it really is the difference between the buying and selling price?

A. Yes, sir.

Q. That fixed the amount of the commissions?

A. Yes, sir.

155 Mr. McConnell objects to the last two questions as leading.

Q. Then explain again, and in your own language, what your commission consists of. What is your commission as you charge it in this case?

A. It is about three or four per cent.

Q. That was the actual amount?

A. Yes, sir.

Q. How do you arrive at it? How do you make the calculation to know how much you shall charge as commission? Is there any agreed commission?

A. No, sir; I always get as much as I can; if I can buy cheap and sell dear, as everybody does, I take it in.

Q. If you can buy cheap and sell dear, the difference is your commission?

A. Yes, sir.

Q. Your commission depends upon the price that you buy at and the price at which you sell?

A. Yes, sir.

Q. Now, then, this contract that you had to deliver on the other side, the June loading. If the Deronda had loaded the ten thou-

sand quarters would your buyer have been bound to you at the price you have already stated?

Mr. McConnell objects to the question as leading.

A. Yes, sir.

Q. Would you have made anything if your purchaser had taken the sale?

A. I would have made the same thing as I do now.

Mr. Beckwith objects to this testimony on the ground that
156 there is no stipulation in the charter party requiring the vessel to load in June, and there never was any—no time whatever fixed in the charter party within which the vessel was to take the cargo, and nothing in the libel alleges that any such time was stated.

Q. What commission did you make on the second sale?

A. I do not remember; I will have to see, as I said before.

Q. Was it a continuation of the same contract or entirely different and separate?

A. Entirely different.

Q. What is your native language?

A. Swedish.

Q. Have you a thorough and perfect understanding of the English language?

A. I must say no, sir; I must repeat again that I have not a good understanding of the grain business.

By Mr. BECKWITH:

Q. The printed portion of the contract marked "Bangston No. 1" appears to have been erased or crossed out. Will you look at the contract and state when that portion of the contract was crossed out?

A. It was made at the same time, because all these conditions were superfluous.

Q. It was in its present shape when it was executed?

A. Yes, sir.

Adjourned to Monday, December 4, 1883, at 3 o'clock p. m.

157 GOMILA & Co. } No. 11965.
vs.
CULLIFORD & CLARK.

NEW ORLEANS, *December* 5, 1883.

Testimony resumed on behalf of the libellants this day.

Present: J. Ward Gurley, Jr., Esq., for the libellants; James McConnell, Esq., for the respondents.

B. F. BANGSTON recalled for the libellants:

By Mr. GURLEY:

Q. Have you produced the letters, telegrams, and documents which were called for on your last examination?

A. Yes, sir; I have got them all here.
Q. The first one is your copy of the charter party?
A. Yes, sir.

Mr. Gurley offers in evidence Exhibit "Bangston No. 3."
Mr. McConnell objects to it because it appears to have endorsements upon it in writing having no connection with the testimony of this witness or to any matter relevant to the pleadings in this case, and, therefore, irrelevant and *res inter alias acta*.

Q. When, where, and from whom did you get this charter party marked "Bangston No. 3?"
A. From J. B. Camors & Co.
Q. When did you get it?
A. On the 14th of July, when the resale of the Deronda took place.
Q. That is the charter party that you got at the time of the second purchase that you speak of?
A. Yes, sir.

158 This testimony and all testimony in connection with it is objected to by Mr. McConnell as irrelevant under the pleadings.

Q. Was that the charter party handed to you at the time of your purchase? Was it part and parcel of the purchase, or was it separate?
A. It was sold with all the documents.
Q. What were the other documents?
A. The bills of lading of the cargo of the steamer Deronda.
Q. Now, the next document called for is what?

Mr. McConnell objects to the testimony of the witness unless he produces all the documents he refers to.

Q. Have you got such documents? Have you got the bill of lading?
A. No, sir; I have not got the bill of lading.
Q. Why not?
A. Because when I bought the cargo I gave it to the bankers that bought the exchange.
Q. Have you got the bill of the purchase?
A. Yes, sir.
Q. Produce that.
A. Yes, sir; there it is.

Mr. Gurley offers in evidence Exhibit Bangston No. 4.
Mr. McConnell objects to it as *res inter alias acta*.

Q. Is there any other paper that you got at the same time? If so, please produce it.
A. I have got the check that I gave to J. B. Camors & Co.

Mr. Gurley offers in evidence the check marked Bangston No. 5.

159 Q. The next document which was called for on your last examination, I believe, was the brokers' contract for the sale of the exchange for the June delivery?

A. Yes, sir.

Q. Have you got it?

A. Yes, sir.

Mr. Gurley offers in evidence Exhibit "Bangston No. 6."

Mr. McConnell objects as above.

Q. That is the paper that you were asked about on your cross-examination by Mr. Beckwith, is it not?

A. Yes, sir; that is so.

Q. The documents next that he asked you for were the cablegrams and correspondence with Stekkebrye & Hiralsoe relating to the first sale?

A. Yes, sir; there is the first letter of the 6th June, which states all the conditions; that is their own letter.

Mr. Gurley offers in evidence Exhibit "Bangston No. 7."

Mr. McConnell objects as above.

Q. That is the letter; now where is the cable?

A. The cable about the buying? I have not got the cables about the buying, of the transaction in that letter marked "Bangston No. 7," but I can produce them.

Q. What cables have you got?

A. I have got the cable refusing the steamer Deronda.

160 Mr. Gurley offers in evidence Exhibit Bangston No. 8. Same objection.

Q. What is the next one?

A. The cable in which they state they would accept the Deronda at twenty-five shillings.

The cablegram is in cypher, and the witness translates it as follows: "We will accept Deronda; twenty-five shillings; cable at once."

Mr. Gurley offers in evidence Exhibit Bangston No 9.

Q. They also called for the account you rendered to Gomila & Co.; have you got that?

A. Here it is.

Q. What is that (letter press) you are now handing to Mr. McConnell?

A. One is a copy of a letter written at that time to Mr. Gomila and the other is the account.

Mr. Gurley offers in evidence Exhibits Bangston No. 10 and Bangston No. 11.

Same objection by Mr. McConnell to both exhibits.

Q. I believe you stated the other day that you had gone to Gomila & Co.'s office and gotten from them the charter-party, which they had, of the steamer Deronda?

A. Yes, sir.

Q. Do you know whether or not Mr. Gomila had begun the loading of that steamer under that charter-party at that time?

A. Yes, sir; they had already begun to load the ship when
161 I got the charter party from them.

Q. Have you got the lot of cables relating to the second sale, which were called for on your cross-examination the other day? If you have, show them to counsel for the respondents for his examination.

Witness hands Mr. McConnell a tied roll of papers, marked on first page Bangston No. 12, as being copies of cablegrams sent by E. Forestier & Co. to Stekkebrye & Hiralsoe, of Copenhagen, with the English translations thereof.

The witness also produces the cablegrams marked Bangston No. 13, Bangston No. 14, Bangston No. 15, Bangston No. 16, Bangston No. 17, and Bangston No. 18, which he states are the cables received from Stekkebrye & Hiralsoe, of Copenhagen, relating to the steamer Deronda, some of them, and some of them from Mr. Forestier himself, who was then at Copenhagen at that time, the signature to the cables showing who sent them. Witness also states that these are not all of the cablegrams; there are some left in his office through oversight, and they will be produced. He states there is only one cablegram at his office that he has not produced.

The same objection to these documents severally as before is made by Mr. McConnell, as being *res inter alias acta* and irrelevant under the pleadings.

And in further response made to the call of counsel for respondents witness now produces, first, the exchange brokers contract of the resale of the cargo of the steamer Deronda, marked Bangston No. 19.

Same objection.

Also the letter from Stekkebrye & Hiralsoe, dated 12th July,
162 1883, relating to the price and condition of the second sale of the steamer Deronda, marked Bangston No. 20.

Same objection.

Also the letter from the same parties, dated the 17th July, 1883, stating that they did not understand why the Deronda took five hundred quarters more than the first-mentioned quantity, marked "Bangston No. 21."

Same objection.

Q. One of these letters shows, I believe, that you sold at twenty-six shillings?

A. Yes, sir.

Q. And the cable shows that you afterwards remitted how much?

A. £1,500.0.0 sterling.

Q. Why did you do that—what was it for?

A. To cover the difference estimated as the loss, owing to the condition in which the Deronda was loaded and shipped.

Q. Do you know what that arises from?

A. Their own letter states that, the cargo having been delayed so much, the risk of the voyage being so great, and the increase of the amount shipped, it was to cover the risk that I remitted the £1,500 sterling.

Recross-examined by Mr. McConnell:

Q. Have you now produced all the documents that you sent to the house of Stekkebrye & Hiralsoe, of Copenhagen?

A. Yes, sir.

163 Q. The copies that are contained in the exhibit marked "Bangston No. 12." I see that these telegrams begin on the 30th of June and end on the 28th July?

A. Yes, sir.

Q. I understood you to say awhile ago that you had sent them a telegram between the 3d and the 9th of July?

A. No, sir; it was the telegram I received from them; — is missing from there.

Q. You sent them no telegrams, then, between the 3rd and the 9th?

A. No, sir.

Q. All the telegrams that you sent them about the Deronda are copied in these papers marked "Bangston No. 12?"

A. Yes, sir.

Q. Have you furnished all the replies that they sent to you on the subject of the Deronda, or have you not some of them still in your office?

A. Well, it is possible I have some more.

Q. The call that we made the other day was for the production of all the written documents that you have on this subject. Why did you not produce them all to-day?

A. I thought these were the most interesting.

Q. You have produced here three letters from Stekkebrye & Hiralsoe, dated the 6th June, the 12th of July, and the 17th of July, 1883.

A. Yes, sir.

Q. Are these the only letters that you received from them with regard to this transaction?

164 A. These are the only letters relating to the Deronda.

Q. You received no other letters from them regarding that transaction of the Deronda?

A. No, sir.

Q. Have you produced copies of the letters that you wrote to them on that subject?

A. Yes, sir.

Q. Are they here now?

A. No, sir.

Q. You were asked to produce all the correspondence and letters on the subject of this transaction.

A. Yes, sir.

Q. Why did you not produce your letters in reply to them or in reply to those that were written by Stekkebrye & Hiralsoe?

A. I would have to bring the books.

Q. You would have to bring copies?

A. Yes, sir; but these letters state the same as mine.

Q. I want copies of these letters.

A. Yes, sir.

Q. How many are there?

A. I cannot say how many.

Q. You will copy them and produce them at the next examination?

A. Yes, sir.

Q. In the letter marked here "Bangston No. 20" I find a telegram which you sent them; it is in cypher; please translate it.

A. I cannot do it now.

Q. Probably the key at your office will assist you in deciphering that?

165 A. Yes, sir.

Q. Will it assist you?

A. Yes, sir; if you want a literal translation it will.

Q. I want a literal translation of the telegrams in the letters of the 6th June and the 12th July from Stekkebrye & Hiralsoe, marked "Bangston No. 7" and "Bangston No. 20."

A. Yes, sir.

Q. And also a translation of the telegram in their letter of July 17th, marked "Bangston No. 21."

A. Yes, sir.

Q. You stated in your examination-in-chief that you had a transaction with some bank with regard to the sale of the bill of exchange?

A. Yes, sir.

Q. What bank was that?

A. The Union Bank.

Q. Did you have any transaction with regard to the sale of exchange on this property—this shipment of the Deronda—with any other bank?

A. No, sir.

Q. Nor with any other bankers?

A. No, sir.

Q. Do you know that any other bank or any other bankers had any other transaction in connection with this cargo?

A. Well, I know that Carriere bought the cargo at auction; that is all I know.

Q. Do you know anything about it yourself? That is only hearsay.

A. Yes, sir.

166 Q. You do know that they made advances or promised to make advances on the shipment of this cargo?

A. I do not know that.

Q. Are Carriere & Co. bankers?

A. Yes, sir.
Q. They are not speculators in grain?
A. No, sir; they are not specially.
Q. They are bankers?
A. Yes, sir; they are bankers.
Q. You have produced a charter party here, marked "Bangston No. —." In whose handwriting is that charter party?
A. I believe it must be that of Mr. De Wolf.
Q. Is that the same one that you got from Mr. De Wolf?
A. Yes, sir.
Q. I see on the back of this paper, "Bangston No. 3," the following words: "New Orleans, July 14, 1883. The vessel has consumed three days in loading the within cargo."
A. Yes, sir.
Q. Whose handwriting are those words in?
A. I don't know.
Q. I see the name of J. B. Camors & Co. under that sentence.
A. Yes, sir.
Q. State whether that is in the same handwriting or in a different handwriting.
A. A different handwriting.
Q. Were you present when either that signature was made by J. B. Camors & Co. or those words endorsed on that charter party were written?
167 A. No, sir.
Q. You know nothing about that?
A. Nothing at all.
Q. It did not interest you?
A. Not in the least.
Q. These words on that charter party and the signature of J. B. Camors & Co. there did not interest you in the least?
A. No, sir.
Q. Who handed you this document—Mr. J. B. Camors himself?
A. No, sir; I believe it was the clerk.
Q. Can you tell me the name of the individual you got it from?
A. No, sir; I cannot; I got this document, "Bangston No. 3," with the bill of lading against this check and the bill from Mr. Camors, marked "Bangston No. 4."
Q. When you got the bill marked "Bangston No. 4" you got the charter party marked "Bangston No. 3?"
A. Yes, sir.
Q. Did you get it on the day of its date or afterwards?
A. The date of the check, July 16th.
Q. Was this check "Bangston No. 5" actually paid at the bank?
A. Yes, sir.
Q. I see it was deposited in the State National Bank. It has marked, stamped on its face, "Union National Bank."
A. I don't know what Mr. Camors done with it when I gave it to him.
Q. But you gave him the check?
A. Yes, sir; that is all I know.

Q. And it was a real transaction?

168 A. Yes, sir.

Q. You paid him the money?

A. Yes, sir.

Q. And that is what you paid for that cargo?

A. Yes, sir.

Q. Did not you do that at somebody's request?

A. No, sir.

Q. How did you know that Camors was the owner of this property?

A. He offered the cargo to me.

Q. That was the only way you knew it?

A. No, sir.

Q. He did not show you how he got the letter?

A. No, sir.

Q. And you did not know?

A. No, sir.

Q. You had bought the cargo from Gomila & Co. originally?

A. Yes, sir.

Q. And you threw it back on the hands of Gomila & Co.?

A. Yes, sir.

Q. Did you suppose then that Mr. Camors got his title from Gomila & Co.?

A. No, sir; I did not know at all about that.

Q. You knew there was some difficulty about the title?

A. Yes, sir.

Q. What was the difficulty?

A. The difficulty was between Mr. Gomila and the captain about the original charter party.

Q. And you know that J. B. Camors & Co. did not buy it at auction?

169 A. Well, I heard that Mr. Carriere, as I told you, bought the cargo at auction.

Q. Did you ask Mr. Camors if he had bought it from Mr. Carriere?

A. No, sir.

Q. Mr. J. B. Camons resides in this city?

A. Yes, sir.

Q. Did you have any conversation with Mr. Gomila about paying this money to Mr. Camors?

A. I believe I said to Mr. Gomila that I had bought the cargo. That was afterwards.

Q. From Mr. Camors?

A. Yes, sir.

Q. What did Mr. Gomila say?

A. I don't know what he said; everybody knew I bought the cargo.

Q. I want to know what Mr. Gomila said when you told him you bought the cargo from Mr. Camors.

A. I cannot remember exactly.

Q. Not exactly; but can you not remember the substance of it?

A. No, sir.
Q. He did say something?
A. I must confess I cannot remember it now.
Q. What was the original price that you were to pay Gomila & Co. for this cargo, in round numbers? Take a piece of paper and give it to me as near as you can.
A. About $51,000.
Q. What is the meaning of that sentence that is endorsed upon the back of that charter party marked Bangston No. 3 that I have read to you?
170 A. That means that it is the custom on every copy of a charter party for the owners or agents to put down how many days are left or have been used for the loading of the vessel. In this case it states that the vessel had consumed three days in loading the cargo. In fact, it is to show to the buyer of the cargo how many days is left for discharging on the other side.
Q. What was the number of bushels that the Deronda sailed from here with; what was the quantity?

Mr. Gomila objects on the ground that the Deronda never complied with her charter party and did not sail thereunder.

Q. What was the actual quantity of grain that the Deronda took from this port when she sailed from here in the month of July last for Copenhagen?

Same objection by Mr. Gurley.

Q. State the quantity in quarters and bushels exactly.
A. It must be ten thousand and sixty quarters. I am not able to give it exactly, but it is about that.
Q. That is certainly right within what quantity?
A. It is over ten thousand quarters.
Q. She sailed from here, then, with over ten thousand quarters?
A. According to the documents that I received.
Q. And you think the surplus was over sixty quarters?
A. Yes, sir.
Q. Now, you received telegrams from the house of Stekkebrye & Hiralsoe, of Copenhagen?
A. Yes, sir.
171 Q. You shipped that grain to them?
A. Yes, sir.
Q. They paid you for that grain, did they not?
A. Yes, sir.
Q. What sum of money—did they not——
A. Yes, sir.
Q. What sum of money did they pay you for that corn?
A. Well, I cannot tell you that.
Q. I want it.
A. I cannot say exactly, but I will furnish you the information.
Q. Can you tell me now about how much it was?
A. Well, two or three hundred pounds sterling.
Q. What else? That will not do me.

A. Well, I will give you the amounts.

Q. It was for the whole amount of that check marked Bangston No. 5?

A. Yes, sir.

Q. How much more?

A. Well, I cannot tell you exactly now.

Q. Was it $5,000 or $10,000 more?

A. It must be between the two sums.

Q. Between $5,000 and $10,000 more?

A. Yes, sir.

Q. But you will examine your books and give the amount accurately?

A. Yes, sir.

Q. I want the cost of the corn to Stekkebrye & Hiralsoe.

A. Yes, sir; you shall have it.

Q. Now, you had two transactions with Stekkebrye & Hiralsoe for this corn?

172 A. Yes, sir.

Q. The character of the transactions were the same, were they not?

A. No, sir; if they had been the same character they would have taken the corn from the beginning.

Q. Explain what you mean by that.

A. By the same character, I suppose, in the same condition. If the steamer had been in the same position all the time they would have taken the cargo as I sold it originally.

Q. I confess I cannot understand you. I must ask another question, which will assist me in getting at what I want. What was the purchase price that they were to pay you on the first transaction?

A. Twenty-eight shillings and one and one-half penny.

Q. Give me the aggregate amount of it all.

A. Eleven thousand pounds sterling.

Q. Put it in our currency.

A. $53,652.50.

Q. Stekkebrye & Hiralsoe, then, were to have paid, as the purchase price of this corn on the first transaction, $53,652.50; is that correct?

A. Yes, sir.

Q. And on the second transaction they did pay you how much?

A. $50,067.65, about.

Q. Did your firm receive that amount from Stekkebrye & Hiralsoe?

A. No, sir; we did not.

Q. If they were to pay that price, $50,067.65, how is it that they did not pay you that?

A. Because after the second sale, which took place on the 11th July, on the 17th or 18th July, they telegraphed us, asking when the

173 steamer sailed, and we telegraphed them that the steamer sailed such and such a day, and in reply to this telegram they refused the cargo the second —, stating that they had bought the

Deronda as a floating cargo, and could not take a cargo that had been so long in port. Then I remitted to Mr. Forestier, in Copenhagen, £1,500 sterling for that reason.

Q. What was the date of that telegram from them to you stating that they would not take this cargo which made you remit the £1,500.

A. The two telegrams of the 26th July, marked Bangston 14 and 13. Bangston 13 reads: "Negotiating, referring to our cable yesterday, you must remit immediately, Hambro accept transfer, £1,500 sterling." Bangston No. 14 reads: "In any case you must remit immediately Hambro, my credit, by cable £1,500. (Signed) Forestier."

Q. These telegrams do not state that they will not take the cargo by the Deronda. I have asked you for the telegrams in which they told you that they would not take the cargo by the Deronda.

A. Well, Mr. Forestier was down there himself.

Q. Is there a telegram here now that you have offered in evidence which declares that they would not take the cargo of the Deronda? If so, produce it.

A. For the first sale?

Witness here produces the telegram marked Bangston No. 15, of the 20th July, which reads: "We have bought Deronda 9,600 quarters floating on the basis of your cable July 2d. We cannot
174 accept if the vessel only sailed July 18th. (Signed) Stekkebrye."

Q. You said your first sale to Stekkebrye & Hiralsoe was for $53,652.50?

A. Yes, sir.

Q. That was for ten thousand quarters precisely?

A. Yes, sir.

Q. Your second sale, which was for $50,067.65 in price, was for more than ten thousand quarters of grain?

A. Yes, sir.

Q. How much more?

A. Well, as I stated to you, about sixty quarters more.

Q. How many bushels in a quarter?

A. Eight bushels.

Q. So that in ten thousand quarters of grain there are eighty thousand bushels?

A. Well, I must explain a little. The grain or maize is lighter in weight. It weighs fixty-six pounds to the bushel. Then you have to make it up, because a bushel of grain generally states sixty pounds, but corn only weighs fifty-six pounds, and then you have to make out or add to the quantity if the bushel weighs fifty-six pounds. Wheat weighs sixty pounds and corn only fifty-six, so we have to make up the weight by the quantity.

Q. On that first transaction, the first purchase that you made from Gomila & Co., did you not buy that grain at the agents of the other parties?

A. No, sir; I was my own buyer.

175 Q. Nor the second either?
A. No, sir; neither.
Q. In both instances you bought it for account of your own house of E. Forestier & Co.?
A. Yes, sir.

By Mr. GURLEY:

Q. You have stated that the ten thousand quarters in price amounted to $53,652.50; upon what basis do you calculate that?
A. Ten thousand quarters which Mr. Gomila sold me at sixty cents per bushel.
Q. Mr. McConnell asked you not what price you paid Mr. Gomila for it, but for what price you sold it to Stekkebrye & Hiralsoe.
A. Well, I stated £1.8.2½. The first sale made in Copenhagen was for £1.8.1½ per quarter of four hundred and eighty pounds.
Q. And it was on that basis that you calculated the ten thousand quarters when you arrived at $53,652.50?
A. Yes, sir.
Q. Now, then, at what rate did you make the second sale?
A. The second sale was made on the basis of £1.6.0.
Q. What was the difference on ten thousand quarters between £1.6.0 and £–.8.1½?
A. That is two shillings and a penny and a half.
Q. Now many cents per bushel would that amount to, in round numbers?
A. From six to seven cents per bushel.
Q. Are you sure that is right; how much will two shillings and a penny and a half per quarter amount to per bushel of corn?
176 That is what we want to arrive at.
A. From six to seven cents per bushel; it is a question of calculation.
Q. How many bushels of corn would ten thousand quarters be?
A. Eighty-five thousand seven hundred and twelve bushels, but ten thousand quarters of wheat would be only eighty thousand bushels. The difference in the result is in the weight of the two articles.
Q. Now, at seven cents a bushel on that many bushels, how much would that be in dollars and cents?
A. That would make about $5,899.84.
Q. You have stated that the difference between the price of the first sale and the price of the second sale was six or seven cents per bushel?
A. Yes, sir.
Q. You have just shown that at the difference of seven cents per bushel the amount of the difference between the first sale and the second sale would be $5,899.84.
A. Yes, sir.
Q. Whereas by your previous examination, in answer to questions propounded to you by Mr. McConnell, you show only a difference of some $3,600 between the price of the first sale and the price of

the second sale; therefore you must have made some mistake, have you not; do you understand that question?

A. No, sir; I do not.

Q. Now, you told Mr. McConnell that the price of the first sale was $53,652.50, did you not?

A. Yes, sir.

177 Q. And the price of the second sale was $50,067.65?

A. Yes, sir.

Q. That makes only a difference of some $3,600 between these two figures?

A. Yes, sir.

Q. Now, you have just shown by calculation that at the rate of seven cents per bushel on ten thousand quarters the amount would be $5,899.84?

A. Yes, sir.

Q. That is a greater difference by some $2,000 than the difference between the two prices stated to Mr. McConnell; therefore were you not wrong in the amount stated to Mr. McConnell?

A. Well, I must be wrong; I have to calculate more carefully about it and correct the error, if I have made one.

Q. And after the second sale do you have to deduct from the price the amount remitted to the other side?

A. £1,500.

Q. How much is £1,500 in American dollars?

A. $7,000, about.

Q. Please add that much to the difference which you arrived at before and state how much it makes altogether.

A. The difference at seven cents?

Q. Yes; the difference at the calculation on seven cents.

A. That would make about $13,000.

Q. Does not that represent the real difference between the prices of the two sales?

A. Yes, sir.

Mr. McConnell objects to the above question as leading.

By Mr. McConnell:

178 Q. You have stated in your testimony that you got from Mr. Camors & Co. the charter party marked Bangston No. 3?

A. Yes, sir.

Q. Did you get from him the account marked Bangston No. 4?

A. Yes, sir.

Q. And that you gave them the check Bangston No. 5?

A. Yes, sir.

Q. Are these all the papers or writings that passed between you or the house of E. Forestier & Co. and J. B. Camors & Co. with regard to this transaction?

A. The only paper I got from Mr. Camors was the bill of lading.

Q. That is all?

A. That is all.

Q. No other papers; not a scratch of the pen more?
A. No, sir; none.
Q. To whom did you hand the check marked Bangston No. 5; into whose hands did you give it?
A. The clerk of Mr. Camors.
Q. What was his name?
A. I don't know.
Q. Was he a boy or a man?
A. He was a man.
Q. You don't know his name?
A. No, sir.
Q. You can ascertain his name and give it to me?
A. Yes, sir.
179 Q. When you handed him that check; you state it was not the same day of the date of the account marked Bangston No. 41.
A. No, sir.
Q. Why did he not receipt the bill, Bangston No. 4, when you gave him the check?
A. Because the receipt is on our receipt book in the office.
Q. Will you bring the receipt book with you the next time you come here?
A. Yes, sir.
Q. What is the date of that receipt in the receipt book?
A. The same date as the check.
Q. Are there any other papers relating to this transaction that passed between you and anybody else? Anything else in writing about this transaction besides the papers that you have produced here to-day?
A. A letter to De Wolf & Hammond.
Q. You have some letters?
A. Yes, sir.
Q. Have you any with Gomila & Co.?
A. I have some more; yes, sir, I believe.
Q. Will you produce these?
A. Yes, sir.
Q. All of them?
A. Yes, sir.
Q. How many are there?
A. Well, there may be one, two, or three; I must see after that.
Q. And you have the replies of Gomila & Co. to you?
A. Yes, sir.
180 Q. Will you bring them also?
A. Yes, sir.

Adjourned to Saturday, December 8th, 1883, 2 o'clock p. m.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

NEW ORLEANS, *December* 8, 1883.

Testimony for libellants resumed as per adjournment.

Present: J. Ward Gurley, Esq., for libellants; James McConnell and James R. Beckwith, for respondents.

B. F. BANGSTON recalled for libellants.

By Mr. GURLEY:

Q. Have you brought with you to-day the papers and documents which were called for upon your last examination? If so, please produce them.

A. Yes, sir; they are here.

Witness here produces ten documents; also his receipt book showing the receipt of the check paid to J. B. Camors & Co., which reads as follows:

"JULY 16, 1883.

"Received from E. Forestier & Co. $40,442.01, amount grain shipped per steamer Deronda.

"(Signed) J. S. CAMORS & CO.
"V. CAMORS."

Witness adds: V. Camors is the son of J. B. Camors.

181 Witness also produces the international telegraphic code book by which he translates his telegrams, and from this book the witness gives a literal translation of the cablegrams referred to in the letter of Stekkebrye & Hiralsoe of 12 July, 1883, marked Bangston No. 20, which literal translation is as follows:

"Deronda;" that is not a code word, but the name of the steamer.

Counsel for respondents states that he merely desires a translation of the telegram, and thereupon the witness proceeds with the following running translation:

"Deronda. Your sale is confirmed; sail grade, by steamer; we will draw C. J. Hambro & Sons, London; advise them. We offer ten to twelve thousand quarters mixed corn, sail grade, by steamer, at twenty-seven shillings, C. I. F.; offer ten — twelve thousand quarters No. 2 red winter wheat, by steamer, at forty-five shillings, C. I. F. The shipment, July, August; Elsinore; orders, Copenhagen or New Orleans; make best counter-offer if limit unattainable."

Now, again, the letter of the 17th July, from Stekkebrye & Hiralsoe, as follows:

"Shipped on Deronda five hundred more. Quotation: mixed corn, twenty-seven; breadstuffs, expect price to improve."

Witness states: "I offer to rectify figures between prices on 28.1½ and 26 shillings."

Mr. Gurley offers in evidence exhibits marked "Bangston No. 22, Bangston No. 23, Bangston No. 24, Bangston No. 25, Bangston No. 26, Bangston No. 27, Bangston No. 28, Bangston No. 29, Bangston No. 30, Bangston No. 31, and Bangston No. 32."

182 Mr. McConnell makes the same objection here as made to the introduction of other documents heretofore produced.

Mr. Gurley states, in reply, that these documents are all now produced in response to a specific call made for them by the proctor of the respondents.

Mr. McConnell rejoins that the record will show how these documents were called for, some of them being produced by the defendants necessarily under the objection of secondary evidence. The record will speak for itself.

Q. This paper which you now produce, and which is here marked Bangston No. 32, is a statement prepared by yourself, is it not?

A. Yes, sir.

Q. In answer to questions asked you on your last examination?

A. Yes, sir.

Q. As to whether or not you had made any error in the difference between the price of the first sale and the price of the second sale?

A. Yes, sir.

Q. You have gone over your figures carefully and you produce this statement, marked Bangston No. 31, as being your revised, corrected statement?

A. Yes, sir.

Q. Had you made any calculation before when you made answer the other day?

A. Yes, sir; I did; but I was afraid I was wrong.

Q. You did it while testifying here?

A. Yes, sir; I made it with a pencil and paper at this table.

183 By Mr. McConnell:

Q. This paper, Bangston 32, that you have produced here to-day, you have made, you say, since your last examination?

A. Yes, sir.

Q. During your last examination by counsel for Gomila & Co., the libellants in this case, you were questioned particularly as to the amount realized from the sale of both of these shipments, were you not?

A. Yes, sir.

Q. Did you not take a pencil and a piece of paper and figure them both up at that time?

A. Yes, sir; but I added that I believed I was wrong, and then promised to give another statement of it.

Q. At the last examination you were asked to produce all the writings that you had from certain parties—all the writings that passed between you and certain parties then named—with regard to this shipment on the steamer Deronda. You have produced a large number of documents here to-day in writing, and you have testified that these are the documents that you referred to and produce in

response to the questions asked. Now, I will ask you again, are these all the documents that passed between you and the parties about whom you were questioned?

A. Yes, sir.

Q. There are none others?

A. No, sir.

Q. We have now before us every letter, paper, and scrap of writing that passed between you and the parties named?

A. Yes, sir.

184 By Mr. BECKWITH:

Q. Can you state what Carriere & Sons had to do with this charter, cargo, or vessel?

A. No, sir.

Q. Did you have any correspondence with them?

A. No, sir.

Q. And no communication with them?

A. No. sir.

Q. They had, then, no right to undertake to direct the agents of the ship about this vessel or cargo that you know of?

A. I dont know of any.

Copy.

NEW ORLEANS, *9th July*, '83.

Messrs. Culliford & Clark, London.

DEAR SIRS: "Douro." We enclose copy of cable passed between us respecting this vessel and are sorry it has not led to business.

Freights are dull at present and a limited demand for tonnage, but we hope to see an improvement later on.

The best we can do at present is 5–3 orders. "Deronda" is still here, and we are having trouble with the charterers respecting her guarantee of 10,000 quarters, but we think we are on the right side, and hope to have her away soon.

Yours truly,

(Signed) DE WOLF & HAMMOND.

Yours of the 23rd just received — S. S. "Viceroy." We may
185 be able to offer you a lump sum; charter later on.

Copies Furnished by Mr. De Wolf, at page 63 *of his Deposition, July* 9, 23, 1883.

Copy.

NEW ORLEANS, 23*rd July*, 1883.

Messrs. Culliford & Clark, London.

DEAR SIRS: "Douro" arrived on the 19th, and we cabled you as per enclosed copy. Your Sunderland house ordered her to Pensacola, and she proceeded on Saturday night.

Freights are a shade firmer to-day, but there is very little doing. We have been fixing up to 15th Sept.; readiness at 421 & 441 Cf. O. U. K. or Continent, ex.—

Rouen, and to-day we are about closing steamer 5–3 direct, same range charter, option Elsinore, for orders to discharge at Copenhagen or Aarhuns, 5–9.

There is nothing special doing in cotton on this side yet. The crops of grain and cotton are looking well & promise a large lot of stuff to go forward.

The writer arrived back safely on the 12th to find the "Deronda" in trouble with charterers, and we have had a fearful lot of trouble and worry protecting ship against all kinds of efforts to shoulder her for loss in not carrying—

Guaranteed quantity of 10,000 qurs. She has now that quantity on board, and has sailed for Elsinore *for* orders to discharge at Copenhagen or Aarhuns. Please keep us posted both for time
186 and other charters, as you have facilities to know the movements of ships on your side which we have not, and we expect to do a large business.

Yours truly,

(Signed) DE WOLF & HAMMOND.

United States District Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

Testimony taken on behalf of libellants before John Devonshire, United States commissioner, this 8th day of December, 1883.

Present: J. Ward Gurley, Esq., for libellants; James McConnell and James R. Beckwith, Esqs., for the respondents.

A. J. GOMILA, sworn for libellants, says:

By Mr. GURLEY:

Q. You are a member of the firm of Gomila & Co.?

A. Yes, sir.

Q. Did you make any contract of charter party with the agents and owners of the steamship Deronda?

A. I did.

Q. Explain what took place at the time.

Mr. McConnell objects on the ground that this is inadmissible. What was said before or since is parole evidence and inadmissible. The charter party must speak for itself.

Mr. Gurley states that it is not an attempt to vary the terms of the charter party.

187 Mr. McConnell objects on the further ground that the contract of charter party with Gomila & Co. is destroyed, and is not the charter party under which the steamer sailed or was loaded. This objection is to apply throughout without the necessity of repetition.

Q. State now what took place at that time.

A. On the 17th or 18th of June last I entered into negotiations on behalf of my firm of Gomila & Co. with De Wolf & Hammond, representing the managing owners of the steamship Deronda. I stated to Mr. De Wolf and the captain, both of whom were parties to the negotiations, that I wanted a vessel that would carry not less than ten thousand quarters of grain, and that I would give a price which I do not remember. They agreed to cable to the owners making the offer at the price named, provided they would guarantee the vessel to carry ten thousand quarters of grain. The reply came that they would be willing to make the contract, providing that the captain would agree to the quantity. Then they came to me, Mr. De Wolf and the captain, and submitted the answer and asked what I thought of it. I replied to them, "My advice to you is to reply that, in your opinion, the vessel will carry ten thousand quarters of grain, because she has done it before." I did not wish the captain to agree to ten thousand quarters of grain. I wished the owners to agree and I wished the responsibility to be upon them, so that if she should not carry that they would have no one to blame but themselves. They made out a cable in my office from my own code book. The captain said: "In my opinion, the vessel will carry ten thousand quarters of grain if we make coal at Halifax." Upon that I showed them my reasons for asking that the vessel carry ten thousand quarters
188 of grain by producing the contract which I had with E. Forestier & Co. to sell them ten thousand quarters of corn minimum, twelve thousand maximum. A copy of the contract is here, and is a counterpart of the contract which was held by E. Forestier & Co. Our contract is the seller's copy, which we retained, and we gave them the buyer's copy. The seller's copy I now produce for inspection.

Mr. Gurley offers in evidence document marked Gomila No. 1.

Mr. McConnell specially objects to this document on the ground already stated and on the following additional grounds, now stated, to all this and similar testimony without repetition, as being *res inter alias acta* and as being secondary evidence and as being an attempt to fix the terms and conditions in the charter party by verbal testimony and by proof of circumstances attending the making of the charter party, when the charter itself is the best and only evidence of what the contract really made between the parties was, this objection to obtain to all testimony on this subject without repetition, and to all documents in connection with the testimony.

Witness continues: I showed him that contract and told him that I had no use for any vessel that would not carry ten thousand quarters of grain; that I must have a guarantee of the amount of it, and feared that if the vessel did not carry that quantity the consequences would be serious. The market had declined and was still declining, and the loss would be very heavy, because the buyer would have the right to reject the cargo if the conditions were not strictly fulfilled.
The cable was sent to the owners of the Deronda and a reply
189 came back accepting my offer, upon which the charter party was made.

Q. To whom did the reply come?

A. To De Wolf & Hammond from Culliford & Clark. The vessel came with an inward cargo, and it took her some time to discharge. She was made ready for loading on the 28th of June, and early on that date we sent the corn and an elevator alongside and began loading her, and she was finished on the 30th day of June at about twelve o'clock. I think we received the certificate of loading from the surveyor of the National Board of Marine Underwriters, stating that she was loaded under their inspection and that she had conformed to all the rules of the National Board of Marine Underwriters. I have the certificate in my hand.

Mr. Gurley offers in evidence certificate marked Gomila No. 2.

Witness resumes: On the morning of the 28th of June Mr. Bangston, of the firm of E. Forestier & Co., came to the office and asked us for our copies of the charter party of the Deronda, in order that he might look over them. I want to say that it is customary with him and all buyers just before the completion of the cargo they come to us for the charter party and we generally endorse these charter parties, because we are the primary charterers, and we transfer all charters by endorsement. In this case I refused to endorse the charter party because there was a guaranty connected with it and it had not been filled and could not be fulfilled until the loading of the vessel, the guaranty of quantity. I handed him the charty party unendorsed at eleven o'clock on the 30th of June. We had no
190 doubt at that time that the vessel would carry the ten thousand quarters, and never had any doubt until we found out the contrary. On the 30th of June I was about leaving the city for a short vacation, and I stepped into the office of De Wolf & Hammond on general business, and Mr. De Wolf stated to me then, after speaking of other business, "By the way, Mr. Bangtson was here and brought your charter party of the Deronda and asked me to make a new one, substituting his name for yours, and I did it." I said to him then, "I don't know what the object could be, because we could transfer them by endorsement," and he answered that Mr. Bangtson wanted to appear as the charterer of the vessel to his buyers on the other side, because he wished to appear as a merchant from first hands, as he termed it. I answered to that, "It will make no difference to me whose name appears on the charter party after the vessel is loaded, but inasmuch as if the vessel does not carry the ten thousand quarters Mr. Bangtson cannot receive his cargo from me and cannot pay for it. Then the contract will fall back upon my hands, vessel and cargo; therefore, if you are willing to give Mr. Bangtson the charter party, erasing my name and substituting his, I will not object after the vessel has completed her contract, and I will expect you to give me back my charter party in case the vessel does not fulfill her contract."

To this Mr. De Wolf said of course he would, and that ended it. I left town that evening, but before leaving we discovered that the vessel could not carry the quantity promised. I then said to Mr. Bangtson, "I am going away for a few days, and I have no doubt

this matter can be arranged with the owners, and any-
191 thing that you do to protect me I will be satisfied with it. It seems to me the best way to arrange the matter is to telegraph to the owners that if they will take the cargo off our hands at 28. 1½, as agreed upon, that nobody will be injured and I will be satisfied; but in case they do not do that, then all I ask is to be made whole in my contract, and you can make negotiations to that effect."

I returned a short time afterwards and found the owners would not take the cargo off our hands at 28.1½ and would not consent to our selling it at private sale at the market price, which was then much lower. Then they, in fact, would not do anything at all. I then cabled over to my correspondents, Barry, Barclay & Co., of London, a house that perhaps enjoys the highest credit of any house in London, and asked them to give us the selling price for a cargo now ready. To this they answered on the 3rd July, asking us to make an offer of the cargo. This we would not do, as we did not want to place a price, and we told them that. On the 4th July they answered: "Maize depressed and declining"—that is, corn—"quotation by steamer 23 shillings. The Ixia"—the name of a steamer—"has arrived; sold at 23.6."

On the 6th July: "Maize market has an advancing tendency. We quote 24 shillings, rye terms." Rye terms means that the condition on arrival at the port of destination must be guaranteed sound—that is, the seller takes the chances of the condition on arrival. I telegraphed also to Z. Van Ryswick to the port of Lysle, France,
asking him to make the quotation offers. On the 4th July
192 he telegraphed: "Grain depressed. Offer 13½ francs nine to ten thousand quarters." The French quotation of grain is made so many francs per hundred kilogrammes. Now, the equivalent of 13½ francs in English money is 23*s.* and 3 pence per quarter—four hundred and eighty pounds. Now, on the 5th of July he telegraphed: "Offer renewed at same price. Cable your lowest price." On the 7th of July he telegraphed: "Renew offer of Wednesday—twenty-five centimes more." That would be three pence more per quarter. In that way we found out by cabling these people what I could obtain for the cargo by my own sales, direct. The owners of the vessel declined to take the cargo off our hands in order to make in whole at the price of 28*s.* 1½*d.*, declining also to recognize our right to sell at private sale in order to establish the measure of damages. We then submitted the matter to our attorney as to how we might safely proceed, and the advice given to us was to sell the cargo at auction, and we did so through D. E. Morphy, auctioneer. His account sales and his process verbal *is* filed and attached to our libel. When we came to give title to this cargo to the buyers at auction we were informed that the agents of the vessel had in the meantime unloaded part of the cargo and arranged her for receiving an additional quantity, and we received the following letters which I now hold in my hand from De Wolf & Hammond, dated July 13th.

Mr. Gurley offers in evidence the letters marked Gomila No. 3 and Gomila No. 4.

WITNESS: Mr. Morphy, the auctioneer, asked us to give title to this cargo. The first document required, in order to give title, was the charter party. This, I have already testified, was de-
193 stroyed by Mr. De Wolf without our knowledge or consent, and therefore we could not furnish it; and in order to substitute it we went before a notary public, Mr. Andrew Hero, Jr., and made a protest about it. This protest simply sets forth my charter party so lost by us.

Mr. Gurley offers in evidence the protest marked Gomila No. 5 without explanation as to what it is offered for.

Mr. Beckwith objects to it on the grounds already stated to the other documents, and on the further ground that the matter was not a legitimate subject for protest before a notary public. Nobody would notice or affect their situation by it.

WITNESS: Then we got a copy of the charter party issued to E. Forestier & Co., and in that way we gave to Mr. Morphy title, who gave it to Mr. Carriere, the buyer at auction.

Q. You then had made a demand upon De Wolf & Hammond for your original charter party?

A. Yes, sir; and he told me that Mr. McConnell objected to his giving it.

Q. Therefore you made the protest?

A. Yes, sir; protested that what he said was not true, and also protested before the notary public. Then we made a title to Mr. Morphy and Mr. Morphy made it to Mr Carriere & Sons. All the parties named in that letter from M. De Wolf & Hammond, excepting Forestier & Co., came to me and wanted to know what they had better do about the remnant of the cargo, and I told them they had better fill it up; that it did not prejudice their position in any
194 way and it did not injure mine. As the matter might come into dispute as to dead freight, I thought altogether best that they should fill it up, and on that I sold sufficient corn to fill up the cargo. I sold 3,122 bushels and fourteen pounds and sent it alongside the ship. I sold that to J. B. Camors & Co. I sold it at fifty-two cents a bushel. That was the balance of her cargo.

Q. How many quarters did you put in this extra 3,122 bushels and 14 pounds.

A. 364 quarters and $\frac{450}{480}$. Now, on that date Messrs. Forestier & Co. received our account according to contract, which I now offer. As fast as we loaded a barge we made out the bill, and we rendered them this bill, under date of the 29th of June, for 52,140 bushels and 5 lbs. at 60 cents per bushel, making $31,284.05.

Mr. Gurley offers in evidence bill marked here Gomila No. 6.

WITNESS: And on the 30th June 30,447 bushels and 53 lbs. at 60 cents per bushel, making $18,268.76.

Mr. Gurley offers in evidence bill, Gomila No. 7.

WITNESS: And the bill also for difference in freight, as per contract, $578.12.

Mr. Gurley offers in evidence bill, Gomila No. 8.

WITNESS: The amount of these three bills is what that quantity of corn would have brought had the vessel carried out her contract. The additional quantity of 3,122 bushels and 14 lbs., if carried, would have brought the same proposition. Now, on the 30th of
195 June, when we all, to our great astonishment, discovered that the vessel did not carry the quantity, Messrs. Forestier & Co. returned us the bills. He had the receipts of the steamer for the cargo loaded. These were the preliminary receipts, upon which the bills of lading are signed afterwards. Messrs. Forestier & Co. said to us that, inasmuch as the quantity did not fill their contract, they could not deliver that corn to their buyers. I don't think that was in writing, but there is writing afterwards about it. They could not draw upon the buyer the bills of exchange to pay us for the cargo, but they would cable and ask their correspondents if they would not receive the cargo on the basis of the diminished quantity. These negotiations were carried —, as far as I know, and on the 5th of July they addressed us the letter marked Gomila No. 9.

NOTE.—The copy of the charter party which accompanied the protest made by Gomila & Co. has already been offered in connection with Mr. Bangtson's testimony.

WITNESS: Messrs. Forestier & Co. called upon us with a statement of their loss, which is annexed to the libel, amounting to $3,194.29, which we paid on the 17th July. I offer the check upon the Union National Bank, which was paid by that bank; already in evidence and marked Bangtson No. 2.

Q. Has the place of coaling anything to do with the basis of insurance of the cargo of a vessel?

A. Yes, sir; the rate of insurance depends upon the intermediate port where the vessel calls, and there is an additional charge made for it. If she calls at more than one port there is still an ad-
196 ditional charge. In this case the cargo was insured on the basis of her coaling at Halifax and no other place, and after she concluded to coal at more than one place the amount of insurance was augmented. Some companies would not take her at all.

Q. Does the coaling place enter into the calculations of the parties making contracts?

A. Yes, sir; because the insurance has to be taken out before the cargo is loaded. The contract of insurance is made with reference to these points.

Q. What kind of an article of commerce is corn; is it a perishable article or otherwise?

A. It is a perishable article in time and transit.

Q. Is there any risk in a voyage across the ocean?

A. Well, there is always a risk in a voyage across the ocean, and particularly if it remains in this port under the heat of a July sun beating on the decks. The risk is increased every day it remains in port.

Q. Is there any risk in leaving port?

A. There is a risk as to the condition of the article.

United States District Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

Testimony taken on behalf of libellants before John Devonshire, United States commissioner, this 15th day of January,
197 1884.

A. K. Miller, Frank M. Hall, D. E. Morphy, W. P. Ross, W. H. De Wolf.

Present: J. Ward Gurley, Jr., Esq., for libellants; J. R. Beckwith and James McConnell, Esqrs., for respondents; Horace E. Upton, Esq.

A. K. MILLER, sworn for libellants, says:

By Mr. GURLEY:

Q. What is your business?
A. Ship and steamship agent.
Q. How long have you been acting in that capacity?
A. Since 1868.
Q. You have had a great deal of experience in chartering vessels?
A. Yes, sir.
Q. Have you been a ship-master before?
A. Yes, sir; a sailing ship-master.
Q. Did you make many voyages?
A. Yes, sir.
Q. When a steam vessel is loaded with a cargo of grain what is her customary mode of proceeding on her voyage to Europe?

Mr. Beckwith objects on the ground that it does not appear that the witness is an expert, and, 2d, that the construction of charter parties, like all other contracts, is a matter of law.

A. There are two well-fixed customs. One is to take sufficient fuel here for the voyage and proceed direct to the port
198 of discharge. At other times to deviate—to call for coal anywhere during the passage.
Q. To how many ports?
A. One port is the custom in coaling.

Mr. Beckwith objects, and it is here understood that this objection shall apply to all testimony of a similar character.

Q. What is the understanding between the charterer and the owners when they charter a vessel to proceed "as customary;" what is the understanding between the parties relative to coaling?

Mr. Beckwith objects for the same reason as above, and, further, that the contract defines the rights of the parties; therefore no evidence of custom is admissible.

A. It is customary to proceed direct unless the charter party stipulates the privilege of coaling.

Q. To how many ports?

A. I never knew in any case but of one port. Optional ports are given, but only one port.

Q. Optional ports is the custom?

A. Optional ports are understood.

Q. How do you know this is the custom?

A. From my experience in making charters.

Q. Have you had much experience in that line?

A. I made quite a number during the last fourteen years.

Q. Where a steam vessel is allowed to coal at more than one port is there any extra charge of insurance?

199 Mr. Beckwith objects, as it is a matter of opinion. Insurance men are the best witnesses of that.

A. I know that wherever a steamer calls that has a berth loading we have to pay extra insurance wherever they were coaled under agreement in the charter party. I have had no knowledge of what extra insurance is charged, as it has been paid generally by the charterers, if any.

Q. Do you know whether there is any extra charge?

A. With regard to calling with a grain cargo?

Q. Yes.

A. I cannot say positively.

Cross-examined by Mr. BECKWITH:

Q. I understand you that you have never sailed a steamship in the grain trade or any other trade?

A. No, sir; I never commanded a steamer.

Q. Your fourteen years' experience has been shore experience, in such relations to steamers as agent?

A. As agent.

Q. When you speak of this being the custom you mean the custom where?

A. The custom of the port for steamers proceeding from this port to Europe.

Q. You do not know what they actually do after they leave port?

A. We do, generally, because we receive at times a cable dispatch from them at the coaling ports.

Q. Have you ever in your life had a case of dispute—I mean, now, on your own vessels—as to the construction of a stipulation in the charter party as to coaling at intermediate stations?

200 A. No, sir; I never had any dispute.

Q. The chief interest of the shipper of the grain and the parties interested in the freight and commissions is that the vessel gets through safely?

A. I have had a dispute about the privilege of calling for coal without the privilege of the charter party.

Q. Answer the question. Have you ever in your life had a case of dispute—I mean, now, on your own vessels—as to the construc-

tion of the stipulation in a charter party as to coaling at intermediate stations?

A. No, sir; I have had no dispute where they have been permitted to coal.

Q. Is it not true that this is one of the conditions always looked after pretty sharply when the contract of charter party is being made—about intermediate coaling?

A. Yes, sir.

Q. This is one of the prominent stipulations and conditions of a charter party?

A. Yes, sir.

Q. Have you ever been an agent of steamships in the grain trade at any other port than the port of New Orleans?

A. No, sir.

Q. Then, when you speak about custom you speak simply of what you gathered up here of vessels as agent while prosecuting your business in New Orleans?

A. Yes, sir.

Q. You know nothing of the custom on the high seas or at other ports?

201 A. No, sir.

By Mr. McConnell:

Q. Have you ever had occasion to compare the printed forms of charter parties?

A. I have.

Q. Has it not struck you that you never found any two of them alike; that they varied in some particulars one from the other?

A. They are very apt to be so.

Frank M. Hall, sworn for the libellants, says:

By Mr. Gurley:

Q. What is your business?

A. A ship broker.

Q. How long have you been engaged in that business?

A. On my own account, since 1872.

Q. Have you had much experience in making charter parties for ships?

A. Yes, sir.

Q. What is the custom as to coaling, or the right to coal, of a ship proceeding from here bringing a cargo to Europe?

A. It depends upon the charter party.

Q. What is the custom—what is the custom usually as to coaling?

A. In what respect?

Q. Have they the right to coal at more than one port?

A. I never heard of them coaling at more than one port after leaving here.

The respondents make the same objections to the testimony of this witness as they made to the last.

202 Q. Do you know whether or not the coaling at more than one place or port increases the insurance?

A. I should say it would.

Respondents object, as the witness is not an expert or shown to have knowledge of the subject, and that no amount of expert testimony can change a written contract.

Q. Do you know of a ship coaling at more than one port under a charter party?

A. I never heard of it.

Cross-examined by Mr. BECKWITH:

Q. Where have you got your experience of this business?

A. Here in New Orleans.

Q. In what character?

A. As steamship agent and ship broker.

Q. There is usually a great deal of care taken as to the stipulations by the charterer about coaling at an intermediate station?

A. Yes, sir.

Q. And, as you understood it, they are to observe that stipulation?

A. Yes, sir.

Q. You say it should increase the insurance to stop at intermediate ports.

A. Yes, sir.

Q. Why?

A. Because it places extra insurance on the vessel if they
203 stop more than once.

Q. Did you ever know an instance of it?

A. I never knew of an instance of coaling at more than one place.

Q. Can you name me a single instance or reason for not coaling at more than one place was assigned to be optional?

A. No, sir.

Q. Do you know any good reason why a vessel should not coal twice if she had it in her charter party?

A. No, sir; it would depend upon the owners of the steamer.

Q. Do you know a good reason why a vessel should not coal more than once if she had a stipulation in her charter party that she may coal at any intermediate port or ports?

Mr. Gurley objects on the ground that the question asks the witness for an opinion of law and not of fact.

A. I should think it would be an expense to the steamer if she called, and it would be an extra insurance on the cargo.

Q. Do you know any good reason why a vessel should not coal more than once if she has a stipulation in her charter party that she may coal at any intermediate port or ports? You have stated that it might be an inconvenience or an expense. Do you know any other reason?

A. It would be an additional insurance on the cargo.

Q. That would be an expense?

A. That would be an expense both to the cargo and the ship.
Q. Have you any experience of any other ports?
A. No, sir; except New Orleans; but I have transacted
204 business in Galveston.
Q. Is there any question of intermediate ports between here and Galveston?
A. No, sir; not between Galveston and Europe.
Q. It will depend upon the conditions of the charter party?
A. Yes, sir.

D. E. MORPHY sworn for the libellants:

By Mr. GURLEY:

Q. What is your business?
A. An auctioneer.
Q. Did you have anything to do with the selling of the cargo of the Deronda?
A. I did.

Mr. Beckwith and Mr. McConnell object to any sale or the evidence of any sale or the instance or particulars of any sale of any cargo or part of the cargo of the Deronda at auction by the auctioneer, Morphy. They object for the reason that they are in no way concerned therein—no party to the sale or to any step taken to bring about the sale; that they are not in any way bound, concluded, or affected by the sale; that the matters connected with the sale are irrelevant to any legitimate issue in this case, this objection to apply to all testimony of a similar character.

Q. Did you have anything to do with the selling of the cargo of the Deronda in July, 1883? If so, please state about that paper attached to the libel, which you hold in your hands, that purports to be the *procès verbal* of your sale, together with your statement of charges.
205 A. Yes, sir; these papers are all correct.
Q. Examine that and state if it is true.
A. Yes, sir; it is true.
Q. Was that cargo advertised for sale before the sale was made? If so, when, how, and in what newspapers, if any?
A. Yes, sir; it was sold after being advertised in the New Orleans Picayune, two squares, five times, and in the Times-Democrat and Daily States, two squares, three times, each.
Q. The Picayune and Times-Democrat are morning papers, published every morning, in this city?
A. Yes, sir; every day.
Q. Are they important papers or insignificant papers?
A. I look upon them as the leading papers in the city for advertising purposes.
Q. Are they not the two chief newspapers in the city of New Orleans?
A. They are.

Q. What is the Daily States; is that a daily paper—morning or afternoon?
A. It is an afternoon paper.
Q. Daily?
A. Yes, sir.
Q. Is that one of the principal papers?
A. Yes, sir; it is.
Q. What is the official journal of the city of New Orleans?
A. I think the Daily States.
Q. Do you know what paper is the official journal of the State?
A. No, sir.
206 Q. Do you know that the Times-Democrat is?
A. Yes, sir; I think so.
Q. Your bill is attached to the libel amounting to how much, including all charges of that sale—how much is it?
A. $934.72.
Q. That is commissions and charges?
A. Yes, sir; advertising and all.
Q. Is that amount correct?
A. Yes, sir.
Q. Did you ever receive payment of that amount?
A. I did.

Mr. Beckwith objects to all this evidence.

Q. How did you make that sale; in what manner did you make it—public or private?
A. I made it publicly at the head of Washington street, opposite the steamship Deronda.
Q. Was it sold—how?
A. To the highest bidder.
Q. How did *he* compare with your other sales—was it the same or different?
A. It was customary sale.

Mr. McConnell desires to know from Mr. Gurley the object of this testimony.
Mr. Gurley states that his object is to prove that it was an ordinary auction sale, made in the same manner as other auction sales.

207 Cross-examined:

Q. Did you make the sale personally?
A. Yes, sir.
Q. When you say that all the statements in this *procès verbal* are correct I suppose you have reference to these statements in it which have immediate connection with the sale itself?
A. Yes, sir.
Q. The advertisement and the price bid and to whom sold?
A. Yes, sir.
Q. For instance, these statements in here like this: "All negotiations for the adjustment of the matter having failed." You know nothing about that personally?

A. No, sir.

Q. "And that this sale had been determined upon for the best interests of all concerned." You know nothing about that?

A. No, sir.

Q. Your *procès verbal* has merely reference to the sale, price, and the bidder?

A. Yes, sir.

By Mr. BECKWITH:

Q. Who actually bid for A. Carriere & Sons at that sale?

A. Themselves; they gave me their own individual check for the amount.

Q. I know; but who was it represented them at the sale?

A. Themselves and son.

Q. They were the only bidders?

A. No, sir.

Q. The check was given you — the spot, at the sale, or was
208 it given afterwards?

A. No, sir; I sent to their office, knowing them to be perfectly responsible.

Q. The check was drawn in your favor?

A. Yes, sir; it was.

Q. What did you do with it?

A. I deposited it in the bank.

Q. Who did you account to for it?

A. Gomila & Co.

Q. After deducting commissions and other charges you paid the balance to Gomila & Co.?

A. Yes, sir.

Q. That is all you know about the money?

A. Yes, sir.

WILLIAM P. ROSS, sworn for the libellants, says:

By Mr. GURLEY:

Q. What is your business?

A. Ship broker.

Q. How long have you been engaged in that business?

A. Fifteen years.

Q. Have you had much experience in chartering vessels?

A. Yes, sir; a great deal.

Q. You charter a great many steamships?

A. Yes, sir.

Q. Steam vessels proceeding from this port to Europe with a cargo of grain, what is the custom relative to coaling?

Mr. McConnell objects on the same ground as specified in
209 the objection made to the testimony of the witness, Captain Miller, and it is agreed that the same objection shall be considered as made to all testimony of this witness on the same subject without repetition.

A. Some steamers have the liberty of coaling and some do not; it depends upon the charter.

Q. But I ask you about the number of times they coal on the way; what is the custom?

A. The custom is to coal once where they have liberty.

Q. Do you know of any cases where they have coaled more than once?

A. I cannot call it to memory at present, of my own knowledge.

Q. Is it customary for steam vessels in that trade to coal more than once between here and Europe?

A. No, sir; it is not customary.

Q. Does it not add to the expense, both to the ship and the cargo, when they coal more than once?

A. It certainly adds to the expense of the ship. I don't know of any expense on the cargo, unless the extra insurance for the second coaling.

Q. Is there any extra insurance on the second coaling port?

A. They always claim it for the second coaling port. Naturally there would be an extra insurance for the second coaling port.

By Mr. BECKWITH:

Q. Where have you acquired your experience of the custom of vessels on the high seas—of vessels in this trouble?

A. As a ship broker, making these contracts.

Q. This is usually regulated by the stipulations in the charter party, is it not?

A. Yes, sir.

Q. Your attention has been called to the matter more
210 definitely by the settling of conditions of charter parties?

A. No, sir; it is generally called to it at the making of the charter party.

Q. That is, in making the conditions of the charter party?

A. Yes, sir.

Q. The conditions are usually made definite as to coaling?

A. Yes, sir.

Q. Did you never go as a passenger or in any way connected as part of crew or equipment of a grain-loaded steamship on her voyage from New Orleans to any grain port in Europe?

A. I have not and do not want to.

Q. And therefore your experience has been such as you got on shore entirely?

A. Yes, sir.

Q. Now, suppose that a vessel loaded with grain started off from the port of New Orleans to, say, Havre, and it was stipulated in the charter party that she should coal once, and that was the belief when she left port, that that was the intention, and that by stress of weather or for any other reason she stopped to coal and the shippers and the consignees did not know that until the vessel reached Havre, would there be any additional insurance to be paid because that vessel had touched that second port, after the vessel safely arrived?

A. Not if she started with sufficient coal for that coaling port to make the voyage under ordinary circumstances.

Q. If she did not?

A. Then she would not be seaworthy.

211 Q. But the question of seaworthiness does not come in here where there is a completed voyage and a delivery. Now, suppose she lands her cargo at Havre without damage and she had stopped at two or three ports and the shipper and consignee do not know it and the voyage is completed and a delivery made, would the insurance companies clap on a higher commission when the voyage was over for stopping at three ports instead of one?

A. I think so; nearly every vessel I know of.

Q. On what authority is that?

A. Because they charge a certain percentage for a certain amount of the risk, for the risk is increased by calling at other ports, and the insurance is increased.

Q. But while the vessel is going she is insured?

A. Yes, sir.

Q. How can you change the contract?

A. The contract may not be changed.

Q. It depends upon the contract of insurance?

A. Yes, sir.

Q. All contracts would depend upon their terms and conditions, and their terms and conditions are not made all alike?

A. No, sir.

Q. Then how can you answer as an expert that there is a custom with reference to these things?

A. I speak as a business man, which I say I am, from an insurance man or a shipper.

Q. Did you hear of a ship on a completed voyage being called upon by the insurance companies to pay a higher rate of insurance than was agreed upon after the vessel has arrived safely and

212 delivered her cargo?

A. I never heard of such a case, to start with.

Q. Did you ever hear of a case, say, of insurance on a grain cargo from any port in America for any port in Europe where grain is sold where the agreement of insurance had been, say, one eighth of one per cent., the charter party stipulating, say, that one port should be touched for coal, making a charge of additional insurance because the vessel, although safely carrying her cargo to the port of destination, had stopped at two ports instead of one to coal?

A. I never heard of such a case where there was a second port came in.

Q. Your experience, then, with steam vessels carrying cargoes has been that they never had occasion to stop at but one port?

A. It never came to my notice except in this Deronda case.

Q. Do you know that she did?

A. It came to me by hearsay.

Q. When you answer that it would be a damage and injury, directly or indirectly, to the shipper of the cargo to have two coaling

ports instead of one on the voyage you were answering on the hypothesis, without having known of such an instance?

A. No, sir; I know of no additional damage to go to an additional port, but it might avoid the policy of the whole insurance.

Q. I am now speaking of experience.

A. The underwriters would charge extra premiums, unless it was stipulated in the first bargain.

Q. Well, suppose it was not stipulated or known at all that she was going to stop at two ports, and she carried the cargo safely,
213 would there be an additional insurance put on in that case?

A. There certainly would be one when it was known.

Q. On which side; on the side from which the grain is shipped or the side on which it was consigned.

A. The underwriters that insured with him would claim from that man who would be the shipper.

Q. You have never known an instance of that kind?

A. It was always the other way when it was known before she reached her destination. They found it out.

W. H. De Wolf, sworn for the libellants, says:

By Mr. Gurley:

Q. What is your business?

A. A ship broker, in connection with the firm of De Wolf and Hammond.

Q. How long have you been engaged in that kind of business?

A. I suppose thirteen or fourteen years.

Q. You have had considerable experience in chartering vessels?

A. Yes, sir; I have.

Q. When a vessel leaves this port with a cargo of grain for Europe what is the custom as to coaling on the way?

The same objection is here made by the respondents.

A. Some of them call for coal and some of them do not.

Q. What is the custom of such ships as to the number of places at which they coal?

A. That is what I could not say, because I don't know how many places she coals; whether she calls at one, two, or three
214 places. After the vessel leaves New Orleans I do not keep the run of the places where she calls for coal.

Q. Is it not customary for vessels to give notice as to where they are going to coal before sailing?

A. I don't think so; I never remember having done so.

Q. Is it not customary to have an undertanding with the charterer as to where they are going to coal before they sail?

A. No, sir.

Q. I believe there has been served on you a *subpœna duces tecum* to produce some papers and telegrams?

A. Yes, sir.

Q. Have you got them with you?

A. I have got some copies of telegrams with me respecting the Deronda, and here are all the telegrams that were sent and received. There are copies of eleven telegrams that were received by us from Europe at New Orleans, and there are fifteen copies which were sent by us from our office, where the originals are, to Europe. I do not know whether they are all about the Deronda charter or not, but they are such as you wanted me to bring from a certain date as received and sent.

NOTE.—The telegrams are copied on two documents, marked A 1 and A 2, both of which are offered in evidence by the libellants.

Q. You have, of course, the originals of the telegrams and cables received?

A. Yes, sir.

Q. And you also have copies, I suppose, in your telegram book of the telegrams that you sent as they were copied at the time?

A. Yes, sir.

215 Q. I wish you would be good enough to produce these.

A. There are some things in these telegrams that do not relate to the Deronda at all.

Q. I merely wish all the telegrams in which anything occurs relative to the Deronda, the purpose being to get at nothing except what does concern the Deronda.

A. These telegrams were all sent in cypher, and if you should get the copy from the telegraph office you should have to get it translated from Watkins' code. I will look for them and bring them to you. They are filed in a book, so that you can inspect them.

Q. At the time that these telegrams were sent and received, in June and July, 1883, Mr. W. J. Hammond was in Liverpool, was he not?

A. Yes, sir.

Q. I see that some of the telegrams were sent by the house to Mr. Hammond from here?

A. Yes, sir.

Q. Mr. Hammond, I suppose, acted as an intermediary on the other side with the owners of the Deronda?

A. Yes, sir; they have a house at Liverpool and a house in Sunderland and a house in London.

Q. You say that the owners have a house in Liverpool, where Mr. Hammond was?

A. Yes, sir.

Q. Then, any of these dispatches that were sent to Mr. Hammond at Liverpool and sent from Mr. Hammond from Liverpool to you were as if addressed to and from the owners?

A. Yes, sir.

216 Q. Mr. Hammond is a partner of yours?

A. Yes, sir.

Q. There was a call also in that *subpœna duces tecum* for some letters; can you produce them?

A. I did not bring these letters down here because they have matters in them which do not relate to this case.

Q. What else did you bring?
A. I brought the charter party, which I now produce.

Witness produces, in obedience to the order of court of *subpœna duces tecum*, the following documents: The charter party dated the 19th June, 1883, between Gomila & Co. and De Wolf & Hammond, agents of the charterers of the steamship Deronda.

Mr. Gurley offers in evidence a copy of the charter party, taken from the original in the book produced by the witness, marked A No. 3.

Q. Look at the original charter party in the book and tell me whose handwriting the body of this charter party is—the black ink?
A. That is my own handwriting.
Q. Whose signature is De Wolf & Hammond, agents by cable authority?
A. My signature.
Q. And Gomila & Co.?
A. By Mr. Gomila.
Q. And C. H. Deffrage?
A. His own handwriting; he is a clerk in our office.
Q. Look at the red-ink endorsement upon the face of the charter party; whose handwriting is that?
217 A. My handwriting.
Q. And the signature?
A. De Wolf & Hammond; I wrote that on the 29th day of June.
Q. The day on which it bears date?
—. ——.

Witness also produces a book from his office containing the original charter party to E. Forestier & Co., a copy of which is now filed and accepted in lieu of the original, marked "A No. 4," dated the 19th of June, 1883, as the date of the charter party to E. Forestier & Co.

Mr. Gurley, for libellants, states that he did not call for this charter party, a copy of it being already in the record, and he does not require it.

Q. Has that original charter party, issued to and signed by Gomila & Co., always remained in that book as it is now?
A. Yes, sir; exactly.
Q. Made the 19th of June?
A. Yes, sir; except the endorsement upon it.
Q. Did you ever furnish copies of that charter party?
A. I did.
Q. To whom?
A. To Messrs. Gomila & Co.
Q. When?
A. Well, it would be about the time the charter was made; about the 19th or 20th of June. Sometimes we do not give out copies of the same date.
Q. Did you give the charter party to anybody else?
A. Not that charter party in the name of E. Forestier & Co.

Q. Did you ever send a copy of the charter party made to
218 Gomila & Co. to Culliford & Clark, the owners of the vessel?

A. I think so, but I would not say for certain.

Q. Is there not a way in which to ascertain positively whether you did or not?

A. Yes, sir; I may find by looking at the books, I think; I am almost certain we sent it.

Q. Please ascertain and let us know, and the time.

A. Yes, sir.

Q. Are these all the papers that you have got with you?

A. Yes, sir; that is all.

Q. The letters referred to in these cables, as well as all other letters referring to the Deronda, you will produce at a subsequent time.

A. You want the original cables?

Q. Yes, sir; I have asked for them already, but I want the letters; some of the letters are referred to in these cablegrams.

A. Well, some of these letters do not refer to this case, but to other business. I do not know whether I should produce them or not.

Respondents here request the libellants to state what they expect to prove by the correspondence called for, with a view of seeing whether they may or not be able to admit the same.

Libellants reply that when the proctor for respondents called for all of the letters, papers, and cablegrams and every scratch of writing concerning this matter, or in any way relating thereto, it was promptly produced. The call for the papers, letters, and writings on the respondents has been made on behalf of libellants in the same manner, and libellants do not recognize the right of respond-
219 ents to require them to state what they want to prove thereby, nor may the interests of the libellants be properly protected unless the inspection of the papers called for is allowed.

Q. Mr. De Wolf, the papers which you have produced to-day, and which have all been identified with your testimony, are the only ones which you produce in return to the order of *subpœna duces tecum* served upon you?

A. These are the only ones.

Q. There are letters concerning the Deronda which you have not produced?

A. Yes, sir; they are not important.

The further examination of this witness is continued for cross-examination by the respondents.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

NEW ORLEANS, *January 18th*, 1884.

Testimony on behalf of the libellants resumed this day.

Present: J. Ward Gurley, Esq., for the libellants; J. R. Beckwith and James McConnell, Esqrs., for respondents.

W. H. DE WOLF, recalled for libellants, says:

By Mr. GURLEY:

Q. Have you got the papers, letters, and other documents called for by the order issued herein on the 18th day December, 1883, and the 17th January, 1884?

220 A. I have.

Q. Please produce them.

A. Which will you have first?

Q. All the letters and cables which passed between Messrs. De Wolf and Hammond, agents, or either of them, and Messrs. Culliford & Clark or either of them, or John H. Culliford, from the first day of June, 1883, to the last day of June, 1883, in any manner relating to this controversy or relating to the chartering of the steamship Deronda to Gomila & Co.?

Mr. McConnell, just coming in at this junction, states that the proctor for libellants having declined to state what he desired to prove by the letters and telegrams called for, which request was made with the simple view of admitting or seeing whether the proposition thus desired to be proved could be admitted or not—made, too, after the adjournment of the last meeting and previous to the service of the new order in this case of *subpœna duces tecum*, and instructed Messrs. De Wolf & Hammond to produce all letters and papers in their possession as called for, which respondent says they would do.

Mr. Gurley, for libellants, states that he has never refused, on his own behalf or that of his clients, to make the statement, but disputed the right of the respondents to call for such a statement, and merely insisted upon obedience to the order of the court issued herein on the 18th December, 1883.

Q. What have you there?

A. The first things I will present to you are the original cables received in cypher.

Witness produces eleven original cablegrams received by the firm of De Wolf & Hammond from Culliford & Clark, marked A
221 5, A 6, A 7, A 8, A 9, A 10, A 11, A 12, A 13, A 14, and A 15.

By Mr. MCCONNELL:

Q. Are these the originals of which you have already produced the copies?

A. I will now produce the copies.

Q. Mr. Gurley has in his hands the copies of the telegrams which you furnished at the last sitting. Are not these—A 5 to A 15—the originals of them?

A. Yes, sir; these—A 5 to A 15—are the originals in cypher. These, from A 5 to A 15, are the originals of the copies I produced at the last meeting, which I now produce, translated from the cypher. There were some matters in the originals which were not in the copies, but which can be examined now.

Q. Are these the literal copies of the whole of these produced now?

A. Yes, sir.

Witness also files copies of their translation of the original dispatches contained in cypher, now marked "A 16."

By Mr. GURLEY:

Q. Does this document which is marked "A 16" contain everything—every word—that appears upon the original cable messages offered or produced by you, marked from A 5 to A 15?

A. Yes, sir; they do.

Q. What is that you produce next in answer to the call?

A. I will produce the copies that we sent.

Q. Have you got them here?

A. Yes, sir. I also hold a copy of a telegram sent from Culliford, London, to Culliford and Clark, Liverpool, about the fixing
222 of the steamship Deronda. This is the copy and the original, marked "A 17."

Q. What have you next?

A. I now produce copies of the cable messages sent about the steamship Deronda, marked "A 18."

Q. Now, are these full and true copies of all cablegrams which you or your firm or either member of it sent with regard to this matter?

A. It is a true copy of the cables sent, but in them are things not relating to the charter of the steamship Deronda, — which are not there. They are in my telegram book, which you are at liberty to see.

Q. Do they contain any reference to anything concerning the Deronda other than the charter?

A. No, sir; nothing whatever to do with it. One of them contains an offer from another party of a lump-sum charter, which did not relate to Mr. Gomila and which you can see.

Q. With that exception, are these true and full copies?

A. Yes, sir; full and true copies of all that were sent about the Deronda.

Q. What have you next?

A. I produce now all the letters received from Culliford & Clark respecting the steamship Deronda—the originals and copies—from the 19th June, 1883, to the 13th August, 1883. There are seven original letters in all and their copies, marked A 19, A 20, A 21, A 22, A 23, A 24, and A 25. The copies have the same mark.

Q. Are there any letters previous to this date concerning
223 the Deronda or the charter party made to Gomila & Co.?

A. These are all the letters about the Deronda.

Q. The correspondence started the first of June?

A. No, sir; we had not any correspondence previous to the 19th of June.

Q. Are these all of the letters that you had from them?

A. Yes, sir.

Q. Relating to this case or the chartering of the Deronda?

A. Yes, sir; these are all we had from them relating to that.

Q. Where are your replies to these letters?

A. These are here. (Witness now produces copies marked A 26, A 27, A 28, A 29, A 30, A 31, A 32, and A 33.) I now produce the letter book from which I took impressions of the originals and from which I made these copies. There are two letters here which are not yet copied—one dated the 9th July and the other the 23rd—but of which I will furnish copies. In the hurry of making copies they were overlooked. They contain nothing about the Deronda.

Q. These copies of your letters which you furnish—are they full and true copies of all these letters?

A. They are full and true copies of all letters regarding the Deronda. There may be other letters in the letter book here not relating to the Deronda, which you are not at liberty to examine.

Q. The copies of the letters that you produce, marked from A 26 to A 33, inclusive, do they comprise all of the letters which you have written, or your firm or either member of it have writ-
224 ten, to Culliford & Clark or either of them, relative to this Deronda difficulty or any branch of it?

A. Yes, sir.

Q. Upon two of these letters, marked A 31 and A 32, there are added certain clauses in lead pencil; who were they added by?

A. By myself, from the letter book.

Q. And with these additions they complete——

A. Everything respecting the steamship Deronda—that is, everything embraced in the call except the two letters of July 9th and July 23d, which I will furnish copies of.

Q. Are all the transactions in all of these details relative to this Deronda matter, so far as any transpired, between De Wolf & Hammond or either of them and Culliford & Clark or either of them, shown in these cablegrams and letters which you have produced?

A. They are all shown there; besides, there is the charter party.

Q. Is there nothing else in writing on the subject?

A. No, sir.

Q. You have produced everything in writing?

A. Yes, sir; I have produced the charter parties, cablegrams, and letters that passed between us.

Q. On your last examination you said that you thought you sent a copy of the charter party of Gomila & Co. to Culliford & Clark, the owners; is that *the* letter marked A 26 the one in which you speak of it to them?

A. Yes, sir; that is the letter we sent the charter party on the 22d of June.

Q. What charter party was that?

225 A. The copy of the charter party between De Wolf & Hammond and Gomila & Co.

Q. What is the date of that letter?

A. The 22d of June.

Q. Is there anything in this correspondence or cables under the date of June 29th or thereabouts relative to the alleged transfer?

Mr. McConnell objects, as the correspondence will speak for itself.

A. I will point out in my letters where the charter party was transferred. The correspondence shows that. You will find that in our letters.

Q. Have you ever chartered any steamer to Gomila & Co. since this Deronda charter?

A. No, sir; I believe not; I don't think we have.

Q. Did you charter to them the steamship Thomas Turnbull?

A. Yes, sir; we had her chartered here, but not for Culliford & Clark.

Q. When did you do that?

Mr. McConnell objects. What is the object of this testimony?

Mr. GURLEY: I have several objects for it; one is the inference in the correspondence on the part of Culliford & Clark and De Wolf & Hammond that they would not charter a vessel to Gomila & Co.

WITNESS: As regards the Thomas Turnbull, we did charter to Gomila & Co. that steamship.

Q. When?

A. I don't know, but I can see by looking at the charter party.

Q. See, then, and give us the date.

226 A. Yes, sir; that charter party is dated the 6th July.

Witness produces the original letter book and the book containing the impressions of the telegrams that he sent to Culliford & Clark in relation to the Deronda, all of which have been compared by libellants and counsel, and that the copies produced and the copies found agreed with the originals in the book.

Q. In whose handwriting is that letter of the 25th July, 1883 marked A 32?

A. W. J. Hammond's.

Q. When did Mr. Hammond arrive here from Liverpool?

A. The 18th July, as proven by his letter marked A 29.

Q. He was not present when the Deronda was chartered and when she sailed?

A. He was here before she sailed, but he was not here when the charter party was made.

The proctor for respondents asks the proctor for libellants whether he offers the documents in evidence which have been called for and produced or not.

The proctor for libellants states that after he has examined them he will decide, and withdraws the papers for the purpose of examination.

The proctor for the respondents insists that the taking of the papers into the possession of the libellants places them in evidence.

The examination is here continued to Monday at 3 o'clock p. m., when the cross-examination of the witness will be proceeded with.

227 United States District Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

Testimony taken on behalf of the libellants before John Devonshire, United States commissioner, this 21st day of January, 1884.

William M. Baker, William H. De Wolf, cross-ex.; B. T. Bangtson, recalled; A. J. Gomila, recalled; Larned Torrey, F. Lazurtegui, Leon Labat, Luther Alfred.

Present: J. Ward Gurley, Esqr., for libellants; James McConnell and J. R. Beckwith, Esqrs., for respondents.

WILLIAM M. BAKER, sworn for the libellants, says:

By Mr. GURLEY:

Q. What is your business?

A. A marine surveyor in this port.

Q. Do you know the steamship Deronda?

A. Yes, sir.

Q. Did you have anything to do with the steamship Deronda when she was here at this port last when she was loading with a cargo of grain for Europe?

228 A. Yes, sir; I inspected her freight.

Q. Did you issue any certificate?

A. I did.

Q. Look at the certificate that is marked on the back of it "Gomila No. 2" for identification, and state whether or not that is the certificate to which you refer.

A. Yes, sir; that is the certificate I issued on that the 30th of June.

Q. Are the statements in that certificate correct?

A. Yes, sir.

Q What is the custom in loading a steamer with grain?

A. The custom in loading a steamer is to go to the steamer when she first arrives, in company with the carpenter employed by the captain, and tell him to fit the ship for grain. After she is properly fitted throughout to the surveyor's satisfaction we give a certificate that she is ready to receive her cargo. We tell the captain how much in bulk and how much in sacks, to take what propositions, and at the same time how deep to load the ship and what free board

he is to have when leaving port. When about finished we again go to the ship and watch her and see that she goes to the marks that we give, and when she gets to these marks we tell them to stop. She stops and we give the certificate. They tell us at the elevator how much grain there is and we give a certificate accordingly.

Q. Was the certificate issued in accordance with that custom?

A. Yes, sir; to the best of my knowledge and belief the ship was loaded at the time I gave that certificate.

Q. What do you mean by free board?

229 A. That is the distance from the deck to the water line at the lowest part down on the ship.

Q. What is the average time consumed in loading a ship with ten thousand quarters of grain?

A. That would depend upon the weather; with fair weather the average time would, I should say, be about three days. I mean with the grain all on hand so that there would be no delay.

Q. Tell us what free board you allowed that vessel?

A. I allowed her four feet nine inches.

Q. Why did you allow her that amount of free board?

A. I gave her that free board according to the rules by which we load ships. Taking the depth of hold we allow so many inches side to the depth of hold for every foot depth of hold of a ship loading.

Q. Does the quantity of coal to be taken on board have anything to do with the free board that you give?

A. Yes, sir; in this respect: If the ship is going for coal, calling on this side the Atlantic, we always ask the captain whether he is going to take more coal on board leaving the coaling port than she has here; if so, we make allowance for that much more. We calculate how much the ship will take to the inch, calculating how much it may be, and loading so many inches less draught here.

Q. What do you know about the coaling of that vessel, if anything?

A. Well, I cannot remember anything about that exactly; anything more than I knew she was going to have coal and loaded her according to these rules.

Q. Did you know where she was going to coal?

230 A. I am not positive, but I think it was Halifax. I am not positive about it. I know that was the intention.

Q. Was that free board given to her with reference to her taking sufficient coal at the last coaling station to run her across?

A. That free board was given her with the understanding that she was to take the same quantity or no more than the quantity taken on board leaving this port.

Q. You have testified of the manner in which a grain vessel is loaded. Now, did this vessel load in that manner?

A. She loaded in accordance with the rules as I have described and according to my instructions.

Q. Do you remember what time you stopped her loading?

A. I do not remember the exact hour, but it was on the 30th of June, about four or five o'clock in the afternoon.

Q. When you stopped her loading could the steamer have taken an additional quantity of grain within the rules?

A. The ship was down to her marks when I stopped loading her at that time.

Q. How many quarters of grain did she have at that time when she was down?

A. I cannot say.

Q. Look at the certificate and see what that states.

A. It does not state the quarters, but it states 82,588 bushels.

Q. Now, suppose that the vessel had had the space and the draught also to have put on board three thousand bushels more or about thirty-two hundred bushels more, could she have done so before midnight of the 30th June? Was it possible, I want to know, for her to have done the work within that time?

231 Mr. Beckwith objects to the question as immaterial, nor is the witness shown to be an expert on that subject.

A. I think it could have been done.

Cross-examined by Mr. BECKWITH:

Q. What is your exact position in relation to the loading of vessels about which you issue certificates; to supervise the loading?

A. My position is that of surveyor of the National Board of Marine Underwriters.

Q. What is the Board of National Marine Underwriters?

A. It is composed of the leading insurance companies of this country, with headquarters at New York.

Q. It is a voluntary association, is it not?

A. Well, I don't know how to answer that question. All vessels are obliged to load their grain under their instructions.

Q. Do you know of any law of any State or of Congress creating that board and giving it powers?

A. No, sir; I do not.

Q. Then you understand it to be a voluntary association of men connected with insurance offices?

A. Yes, sir; I presume it is.

Q. Why do they establish rules imperative as to the amount of free board?

A. Free board is left in all cases. The rules of grain ships are imperative, except the draught. That is left to the surveyor, and in each port the board of surveyors establish a set of rules which they consider, as nautical men, *as* proper for the loading of a vessel—not to have her too deep.

232 Q. What was the depth of hold of the Deronda?

A. I don't remember now.

Q. Did you ever measure it?

A. No, sir; we took the depth of hold from the register.

Q. The depth of hold amidships?

A. The depth of hold taken from the register of the vessel is the depth of hold amidships.

Q. Did you see the register of that vessel?
A. I don't know that I did.
Q. Did you go to the consul's any time to look at it?
A. No, sir.
Q. Do you know how many inches they are allowed of free board for the foot of the hold?
A. I allowed two and one-half inches to the foot depth of hold in salt water. I made an allowance of a quarter of an inch to every foot of draught, in addition to fresh water, as the rise between salt and fresh water.
Q. Do you remember the plimsol mark on this vessel—where it was?
A. No, sir; I cannot say; we only use that as a sort of guide and measure the plimsol, whatever it is, after going on our own draught, if the number of the survey of the plimsol is the mark that we have given her, and tell the captain that he can load to the centre of the number or below it, or to any part of it, according to the measurement taken.
Q. Do you remember whether the plimsol mark, when this ship had the 82,588 bushels in, was above or below the water?
A. I don't remember; I cannot tell you.
Q. Do you know what coal she had in?
233 A. No, sir.
Q. Do you know whether she had any water in her ballast chambers?
A. No, sir; I do not.
Q. You say you think she could have loaded the balance of the ten thousand quarters up to midnight of the 30th of June; you presume it was on hand in the elevator?
A. Of course, it was supposing that the grain was there that I answered the question first.
Q. Do you know whether there was that amount of grain there in sight?
A. I do not.

By Mr. McConnell:

Q. Subsequent to the 30th of June was there any portion of the coal taken out of this vessel and the balance of the cargo taken in?
A. After the 30th of June; yes, sir.
Q. The vessel left this port with more grain on her, did she not?
A. Yes, sir.
Q. Did you give a certificate that she was properly loaded when she left here?
A. Yes, sir.
Q. Is this the document?
A. Yes, sir; this is the document.

Respondents offer in evidence the certificate marked "B 1."

Q. This certificate, marked "B 1," is dated the 13th July, 1883, and is signed by yourself and Thomas Conway?
A. Yes, sir.

Q. In your official capacity as surveyor, was it not?

234 A. Yes, sir.

Q. "Inspectors of the underwriters of New Orleans and general marine and river surveyors for the inspection of vessels." You gave this certificate on the 13th July, 1883, in the same capacity in which you gave the other certificate, here marked "Gomila No. 2?"

A. Yes, sir.

Q. According to this last certificate you stated that the steamship Deronda had completed her loading this day and has now on board 67,406$\frac{4}{5}\frac{2}{6}$ bushels of grain in bulk?

A. Yes, sir.

Q. And 18,307$\frac{2}{5}\frac{3}{6}$ bushels in 6,914 sacks, making a total of 85,714$\frac{1}{5}\frac{5}{6}$ bushels?

A. Yes, sir.

Q. Was that the cargo that that steamship left this port with?

A. Yes, sir.

Q. She actually had that amount of cargo on board on the 13th day of July, 1883?

A. As given me by the elevator people; I did not measure the weight.

Q. As you got it from their weight?

A. Yes, sir.

Q. You got both quantities measured in each certificate in the same way?

A. Yes, sir.

Q. You have no reason to doubt that this ship left this port with that cargo on board?

A. No, sir.

235 Q. You don't know that she discharged any part of it?

A. No, sir.

Q. If she had you would have known it?

A. Yes, sir; I think so.

By Mr. GURLEY:

Q. You were asked some questions by one of the counsel as to whether or not there was any law organizing the board for which you act. I want to know, as a matter of fact, whether or not all vessels loading with grain from this port are loaded in conformity to these rules?

A. Every vessel. I have never known one to go away with a full cargo without being loaded under these regulations.

Q. Can a vessel loaded with grain for Europe obtain insurance and proceed on her voyage without the issuance of these certificates?

A. No, sir.

WILLIAM H. DE WOLF recalled for cross-examination.

By Mr. McCONNELL:

Q. Have you got the two original charter parties that you produced here in evidence—the first one that was given to Gomila & Co. and the other one given to E. Forestier & Co.?

A. Yes, sir.

Q. Have you got them with you?

A. Yes, sir.

Q. Let me see them.

A. They are there in the book.

Q. Looking at the charter party dated the 19th June, 1883,
236 I find written across the face of it in red ink:

"JUNE 29, 1883.

"This charter party has been cancelled at the request of A. J. Gomila, of Gomila & Co., and a similar charter party made out to E. Forestier & Co., and the copies of said charter party previously given to Messrs. Gomila & Co. have been returned to us by E. Forestier & Co. and destroyed.

"DE WOLF & HAMMOND."

Who wrote that?

A. I did.

Q. Are the statements contained in that correct and true?

A. They are.

Q. When did the steamship Deronda leave this port?

A. I think she left this port about the 17th of July.

Q. A certificate has been offered in evidence, signed by Thomas Conway and W. M. Baker, inspectors for the underwriters in New Orleans, certifying that on the 13th day of July, 1883, "ship Deronda completed her loading this day and has now on board 67,406$\frac{9}{56}$ bushels of grain in bulk, 18,307$\frac{3}{56}$ bushels in 6,914 sacks, making a total of 85,714$\frac{1}{56}$ bushels." I will ask you whether that was the quantity of grain or not that was put upon that vessel and whether she left this port with that quantity on board.

A. Well, I cannot say that; I examined my books and I think that is correct. I can tell better by that, because she had on her ten thousand quarters; that is what she had on her. As regards the quantity on board, we always get that from the shippers. We go by what they give us. The only way we know is by getting the amount from the shippers upon which they pay the
237 freight.

Q. Do you know it yourself, personally?

A. No, sir; not at all.

Q. I suppose this certificate of the inspectors is the best evidence of what she had in her?

A. That is the best evidence; that will show.

Q. How many bushels are contained in ten thousand quarters, as required to be loaded on board that ship?

A. Well, you see, taking bushels of corn and bushels of wheat, there is a difference in the weight.

Q. I am taking the grain that was loaded on board that ship.

A. Take so many pounds and divide them by fifty-six and you have the number of bushels, and divide the total by four hundred and eighty would give you the number of quarters.

Q. How many pounds to the bushel, according to the charter party?

A. The charter party is not by the bushel; it is by the quarter of 480 pounds to the quarter.

Q. How many bushels would that give, if the ship was loaded with the ten thousand quarters, according to that measurement?

A. I would have to figure that up.

Q. Figure it up and give me the statement.

A. I will figure it up bye and bye.

Q. Will you please look at the document here, marked "B 2," called the protest of Gomila & Co., for non-fulfillment of charter party of the steamer Deronda, made before John G. Eustis, notary, and state whether that was made at your request or not?

A. Yes, sir; it was.

238 Respondents offer in evidence protest marked "B 2."

Q. It was signed by De Wolf & Hammond, agents steamship Deronda?

A. Yes, sir.

Mr. Gurley, for libellants, objects to the introduction of the document marked "B 2," on the ground that it is not competent evidence and proves nothing except *rem ipsam.*

Q. Here is a similar one of E. Forestier & Co., of the same date, by the same notary.

A. Yes, sir; De Wolf & Hammond done that also.

Respondents offer in evidence document] marked "B 2," subject to Mr. Gurley's objection, as above stated.

Q. And here is another one of the next day, June 7th, 1883, protest before the same notary, against Messrs. Gomila & Co. and E. Forestier & Co., made by Captain George A. Eldridge, captain of the steamship Deronda, and by Mr. W. H. De Wolf, of the firm of De Wolf & Hammond.

A. Yes, sir.

Respondents offer in evidence Exhibit "B 4," subject to libellants' objection, as above stated.

Respondents offer in evidence a copy of the certificate of registry of the British steamship Deronda, here marked "B 5," to which libellants reserve objections.

239 Witness, being shown document marked Gomila No. 1, already offered in evidence, purporting to be a grain contract, dated June 7th, 1883, between Gomila & Co. and E. Forestier & Co., is asked:

Q. State whether that document or any similar document to that was shown by Gomila & Co. or Mr. Gomila previous to the date of the charter party with Gomila & Co.

Mr. GURLEY, for libellants: So far as the effect of this question may go to the impeachment of the testimony already given by this witness on that subject, the question above is objected to.

A. No, sir; I never saw this document before.

Q. How did you come to consult me as attorney in this case?

A. We had cable authority to do so.

Q. From whom?

A. From Culliford & Clark to consult Mr. McConnell, the indemnity lawyer.

Q. What time did you first come to consult me; on what day of the month?

A. The 4th of July.

Q. Where?

A. At your house.

Q. What time in the day?

A. I don't remember exactly whether it was morning or the afternoon, but I think it was the afternoon, late. Still I do not know for certain.

Q. Did you not bring the captain with you?

A. I did.

Q. Up to the time that you and the captain came to consult me were you not under the conviction that the vessel was fully loaded?

240 A. We were.

Q. What changed your opinion that she was not?

A. When we saw you you asked the captain if he could not make room by taking out some of his coal in the bunkers for the balance of the cargo.

Q. Did I not tell him that under the conditions of the charter party he had the right to coal at different ports?

A. Yes, sir; and the captain said he could discharge a part of his bunker coal and make room for the balance of the cargo; you advised him to do so.

Q. I advised him to do so, and then he proceeded to do so under my advice?

A. Yes, sir.

Q. Now, there is a dispatch in here sent by you, dated July 3d, 1883, in these words: "170 tons coal; surveyors refuse load deeper; ship full all over; no advantage; Newport; cargo sold." That expression in there "ship full all over," that dispatch was written before you came to see me, was it not?

A. Yes, sir.

Q. You had a different idea after you came to see me, and had submitted the charter party to me?

A. Yes, sir; that dispatch is in reply to one that came from Culliford & Clark ordering the vessel to coal at Newport News.

Q. What was my advice to you on the subject, that the ship must take the ten thousand quarters, if she could, by taking out the coal, and that you must do it?

A. You advised us that she should take the ten thousand
241 quarters by taking out the coal; that she must do it.

Q. Did not the ship proceed to take out the coal and take in the cargo?

A. Yes, sir.

Q. Do you know the quantity of coal she took out?

A. I don't remember.

Q. But she proceeded to take out the coal, did she not?

A. Yes, sir.

Q. Then you demanded the balance of the cargo by one of these protests filed in evidence?

A. Yes, sir; we did.

Q. Did you or not demand the balance of the cargo of the vessel before that sale was made by Gomila & Co. or by D. E. Morphy, auctioneer?

A. I really forgot when I demanded the cargo, but the documents will show.

Q. Did you not give them notice in writing that you were ready to receive it?

A. We did give notice.

Q. Was not that notice given previous to that sale?

A. Yes, sir; I am positive of that. The documents will show that.

Q. Will you examine your books and produce a copy of a letter written to all the parties in interest previous to that sale of the grain by Morphy, auctioneer?

A. Yes, sir.

Q. In which you state that you would be ready to receive the balance of the cargo?

242 A. I will furnish that letter.

Q. Have you your charter-party book here with you?

A. Yes, sir; it is here.

Witness has placed before him the charter-party book in which he keeps the originals of the charter parties made.

Q. Now, I will ask you what is your custom when you make a charter party to one merchant and that merchant instructs you to give the ship to another party? Do the merchants write a transfer on the back of the charter party, or do you require, and has your custom been or not to require, the cancellation of the first charter party and the issuance of a new charter party to the person to whom the vessel is given?

Mr. Gurley, for libellants, objects on the following grounds: 1st, because the custom of De Wolf & Hammond would not establish a custom of that business in this port; 2d, because no custom can change the plain provisions of a law nor affect the legal status of parties to contracts.

Q. State how you are in the habit of doing that thing.

A. When we make a transfer of a charter party of that kind or another person takes the charter party of the same date the only change is the name of the firm. They hand in to us the certified copies of the charter parties that we have issued. We then issue a

charter party in the name of the other party, of the same date and the same in every respect, with exception that we change the name.

Q. And cancel the first one?

243 A. Yes, sir.

Q. Now, will you please look back in your charter-party book; I want you to look back to see what your custom is in your charter-party book.

Witness, referring to his book, which contains the original charter parties, says: "For instance, here is a charter party dated New Orleans, 7th June, 1883."

Q. By which you chartered what steamship?

A. Chartered the steamship Elagenshire to E. Forestier & Co.

Q. What is written on the face of the charter party in red ink?

A. This is written: "14 June, 1883. At the request of Mr. Bangtson, of Messrs. E. Forestier & Co., this charter party has been cancelled and a similar charter party made out to Gomila & Co., and the copies of said charter party previously given to E. Forestier & Co. have been returned to us and destroyed.

Q. Destroyed by De Wolf & Hammond?

A. Yes, sir.

Mr. Gurley, for libellants, objects as above.

Witness says: Another illustration of a charter party transferred is here—on the 24th June, 1882—of a vessel called the Prince Rudolph, made to Gilmore & Co.; written across the face of it: "August 23, 1882, cancelled." Here is another one, a charter party of the 24th of July, the bark Carniole, made out to Gomila & Co.; this had been written across the face of it, 16th September, 1882. Here is another of the 5th June, 1880, bark Francis Herbert, to Gordon & Gomila; written across the face in red ink: "July

244 10, 1880. At the request of A. J. Gomila, of Gordon & Gomila, this charter party has been cancelled and a similar charter party made out to Selligman, Hellman & Co., and the copies of said charter party previously given to Gordon & Gomila have been returned to us and destroyed."

Q. When can you furnish that statement? I want you to furnish me the statement that was made of copies of letters written and sent to any parties relative to the additional grain required to make up the quantity of ten thousand quarters.

Respondents offer in evidence the charter party already filed, marked "A 3," together with the endorsement thereon in red ink and signed De Wolf & Hammond. They also offer in evidence the charter party already filed in evidence and marked "A 4," of the same date as the document "A 3," to wit, the 19th June, 1883, made by De Wolf & Hammond, agents by cable authority, to Messrs. E. Forestier & Co.

Q. Would you have given two charter parties out at the same time to two different parties for the same vessel and the same voyage?

A. No, sir; not without cancelling one of them.

Mr. Gurley objects to the above question on the ground that it is an improper question, because the issue is not what he would have done, but what he did do; 2dly, because the authority which he had from the owners is the best evidence of what he could properly do.

245 Q. I will ask you whether in the case of the Deronda you did so or not give out two subsisting charter parties at the same time or whether one of them was not cancelled?

A. No, sir; one of them was cancelled.

Q. They did not both exist at the same time?

A. No, sir.

Q. Which one was cancelled and which one was issued and loaded under?

A. The charter party to Gomila & Co. was cancelled and the ship was loaded under the charter party given to E. Forestier & Co.

Q. The charter party of Gomila & Co. was cancelled on the 29th of June?

A. It was the 28th of June; but it was on the 29th that I noted the cancellation.

Q. Then, when the ship was being loaded on the 30th June and you telegraphed over that she was "full all over," who were the charterers?

A. E. Forestier & Co.

Q. After you began to take out coal from this vessel to load her, did you demand the balance of the cargo to load her in accordance with the advice that I gave you?

A. Yes, sir.

Q. Will you state whether or not you were met with various obstructions made by different parties to prevent your doing so; if so, what were they?

A. There were some obstructions by the surveyor, for instance.

Q. What were they?

A. The surveyor was rather indignant about the captain
246 removing his coal to take it up in grain.

Q. Were not notices served on you by the underwriters?

A. Yes, sir; about taking the water out of her boilers.

Q. Will you please to produce these papers that were served upon you at that time by the different parties? Have you got them with you?

A. No, sir; I have not got them here; you have copies of them. Do you want the originals?

Q. No.

A. Well, then, you have them.

Q. But bring the originals here.

A. Yes, sir; I will.

Cross-examination suspended; adjourned to January 24, 1884, at 3 o'clock p. m.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

NEW ORLEANS, THURSDAY, *January* 24, 1884.

Testimony for libellants resumed this day as per adjournment.

Present: J. Ward Gurley, Jr., Esq., for the libellants; James McConnell, Esq., for the respondents.

B. T. BANGTSON recalled for libellants.

By Mr. GURLEY:

Q. Were you present at the last examination in this case when Mr. De Wolf was testifying?

A. Yes, sir.

247 Q. Did you hear his testimony relative to the truthfulness of the statements written in red ink across the face of the charter party issued to Gomila & Co.?

A. Yes, sir; I heard it.

Q. What have you to say about that statement?

A. Well, in my opinion, it is not the exact truth.

Q. You have testified in this case before on that subject. You have stated in substance that there was no authority given to Messrs. De Wolf & Hammond to cancel the charter party to Gomila & Co.?

A. Yes, sir; I said so.

Q. Do you maintain that as the truth?

A. Yes, sir; I maintain that.

Q. The testimony that you have heretofore given, then, on that subject is entirely correct?

A. Yes, sir.

Q. Are you the counsel of Sweden & Norway?

A. Yes, sir.

Q. How long have you been so?

A. Eighteen months.

Cross-examined by Mr. MCCONNELL:

Q. You have stated that the statements made by Mr. De Wolf in your hearing here as a witness—that it was not true with regard to the red-ink endorsement. Do I understand you to say so—the red-ink endorsement on the charter party?

A. My opinion is that it was not the truth; that is what I mean to say.

Q. I wish you to tell me wherein it is your opinion that it is not the truth; what fact stated in that endorsement is it, in

248 your opinion, that you refer to?

A. As I said in my first statement, there was no cancellation of the charter party; that is only an opinion that I have upon the subject.

Q. All that you refer to, then, when you say that it is your opinion it is not true is this: that you mean to say that you did not authorize Mr. De Wolf to cancel the charter party of Gomila & Co.; is that what you mean?

A. Yes, sir.

Q. Nothing else?

A. No, sir; nothing else.

Q. You refer to no other statement of Mr. De Wolf?

A. No, sir; I refer to no other statement.

Q. Does Mr. De Wolf in the endorsement on that charter party say that you authorized him to cancel the charter party of Gomila & Co.?

A. No, sir.

Q. Why, then, do you say that his statement in red ink on the charter party is not true, in your opinion, if that is what you say?

A. Well, there was no order given by me or anybody else to cancel the charter party. I had no order from anybody else to cancel the charter party, and therefore I maintain that the statements he made are not true.

Q. That is your opinion?

A. Exactly.

Q. In other words, you mean to say that you did not authorize the cancelling of that charter party of Gomila & Co.?

249 A. Yes, sir.

Q. That is all you mean to say?

A. Yes, sir.

Q. When you were on the stand before you were questioned with regard to the number of bushels that the Deronda carried away from this port—the number of bushels of grain?

A. Yes, sir.

Q. You shipped grain by her, did you not?

A. Yes, sir.

Q. Will you be good enough to tell me the number of bushels of grain that the Deronda took away finally from this port?

A. Well, I have not it in my memory now, but about eighty-seven thousand bushels.

Q. That is what you have heretofore stated in your testimony?

A. Yes, sir.

Q. And you have not it in your memory now?

A. No, sir.

Q. Do you remember how many quarters it is?

A. Yes, sir; ten thousand and fifty quarters.

Q. It was over ten thousand quarters?

A. Yes, sir.

Q. It was ten thousand and fifty quarters, about?

A. Yes, sir.

Q. You are positive it was over ten thousand quarters?

A. Yes, sir.

Q. About how many bushels in that fifty quarters over besides the ten thousand quarters?

A. It would make four hundred bushels more.

250 Q. More than ten thousand quarters?
A. Yes, sir.
Q. And that she had in her when she sailed from this port?
A. Yes, sir.
Q. And that quantity she delivered on the other side?
A. That I cannot tell you.
Q. She arrived on the other side?
A. Yes, sir; but I don't know it.
Q. You have advices from the other side that she arrived there, have you not?
A. Yes, sir.
Q. And delivered the cargo?
A. Yes, sir.

A. GOMILA recalled for libellants:

By Mr. GURLEY:

Q. You have heard the testimony given in this case by Mr. De Wolf?
A. I have.
Q. Relative to the red-ink endorsement made by him on the charter party issued to you?
A. Yes, sir.
Q. He states in that endorsement that the charter party was cancelled by your authority and request. Is that so?
A. It is not so.
Q. Did you ever, in any manner at all, give him or any other person any authority to cancel that charter party?
A. I never gave him or any other person authority.
Q. You have been engaged in the grain business for a long time?
251 A. I have been engaged in the grain business as a brokerage business and exporting since 1876.
Q. Do you deal in this business extensively?
A. Yes, sir; I am one of the heaviest dealers.
Q. Do you charter many ships?
A. Yes, sir; I charter a great many ships for cargoes and part cargoes.
Q. For the last few years can you state how many vessels you chartered?
A. Not without making up a list, but I can give you a statement that the annual average of grain has been five million bushels—that is, I have handled that much grain every year, except one year when the crops failed, and from carrying out that business I had to charter vessels for entire cargoes and vessels for part cargoes. The average carrying of one of them would be eighty thousand bushels. Then from that quantity you can figure how many vessels I have had to charter—a very large fleet.
Q. Within the past three or four years how many vessels have you chartered?

A. Well, for part cargoes and whole cargoes, perhaps over two hundred vessels. When I speak of chartering I mean that I charter them when I load with a full cargo and engage here for a part cargo.

Q. So far as the responsibility of the charter party goes have you had any difficulty in obtaining charters?

A. I never had any difficulty so far as responsibility is concerned.

Q. Have you had any difficulty now on that subject?

252 A. No, sir; none whatever, except Culliford & Clark. They pretended I have, but I do not believe that. I think I have good reason for saying that they would charter me a vessel to-morrow. I have been offered one of their vessels.

Q. Have you any reason to believe so, emanating directly or indirectly from them?

A. The reason I have is a letter which I saw shown me by Messrs. De Wolf & Hammond, wherein they stated "not over that amount, 44 shillings, per ton register; that the price was insufficient, but particularly that the charterer was Gomila." That happened since the Deronda matter.

Q. Please look at this paper, marked "Gomila No. 1," which was shown to Mr. De Wolf the last time he was on the stand and he swore that he never seen that before the commencement of this case. Was it ever shown to him?

A. It was shown to him and to Captain Eldridge. I know that he saw it and considered it in connection with his charter—both of them, Captain Eldridge and De Wolf—at my office. I told them that was my purpose in chartering the vessel; that it was to carry out this contract; that this was the only vessel I could get within the time, and that I required her to carry ten thousand quarters. I wanted them to guarantee the ship or I would not take it; that if the vessel did not carry the quantity the damages would be very heavy.

Q. Was that before the charter party was executed?

A. Yes, sir; that was before it was executed; that was the subject of the charter party.

Q. Are you now doing a large business in this line?

253 A. Yes, sir; as much as the weather will permit. The river is frozen and our business is suspended for the time being.

Q. How many difficulties have you had with these vessels?

A. Since the beginning of my business in chartering vessels, not to include five disputes which came to court, I have had some disputes where discussions have taken place and the difficulties amicably arranged. I have had cases of dispute in the courts, one of which was the Highbarry, which was a case of contract, won for me; the case of the Marlborough, the Dupuy De Lorné, and probably one other vessel, which has not yet been brought to suit, and I will add the steamer Altna Craig. In the latter case there is no money issue involved, but simply a question of principle. These are all

the disputes that I remember to have had that were not settled amicably between the disputing parties.

Q. On the 30th of June last, when this vessel was pronounced "full all over," was there any more grain at hand tha t could have been loaded on her?

A. The barge she had at that time alongside of her had a remnant on her of some seventeen thousand bushels.

Q. Was that sufficient to complete the cargo of ten thousand quarters, if the vessel could have held it?

A. She only required thirty-two hundred bushels more out of that quantity.

Cross-examined by Mr. McConnell:

Q. I suppose you had that information of the quantity of grain on hand from your employees; you did not know it yourself, personally?

A. Yes, sir; I did, because I paid for the grain in the
254 barge. I have the bill of lading of the same barge myself.

Q. You referred in your testimony to an extract from a letter. That letter you have reference to is one of the letters produced by Mr. De Wolf under the order of *subpœna duces tecum?*

A. Yes, sir; but I saw that letter before it ever came to this court. I was shown it by Mr. De Wolf & Hammond themselves.

Q. Have you read the other letters filed in this case by De Wolf & Hammond in obedience to the call of *subpœna duces tecum?*

A. Yes, sir; I have.

Larned Torrey, sworn for libellants, says:

By Mr. Gurley:

Q. You are a member of the firm of Gomila & Co.?

A. Yes, sir.

Q. Look at this paper, marked "Gomila No. 1," and state whether you know that was ever shown to Messrs. De Wolf & Hammond or either of them or the master of the steamship Deronda; if so, when, where, about what time, and what was said to him by the parties?

A. I remember seeing this contract before. I was present when Mr. Gomila was negotiating for the charter of the Deronda. I remember that he showed Mr. De Wolf and Captain Eldridge this contract in Gomila & Co.'s office, I think, about the last half of June.

Q. What was said about it?

A. Mr. Gomila was very careful to explain to these gentlemen, both of them, after showing the contract, that it was necessary to have a vessel that would carry the required quantity, and unless
she did he did not want her; that the vessel must be
255 guaranteed to him to carry that quantity, and unless they did guarantee her to carry ten thousand quarters he could not use her.

Q. Was there anything said as to what the result would be in case she did not?

A. He cautioned them that in case she did not carry that——

Mr. McConnel objects to all this testimony on the ground that it is incompetent by parole proof to enlarge, vary, or contradict the written terms of the contract of charter party, and on the further ground that nothing said before, at the time, or since the signing of said contract of charter party is admissible in evidence to affect the rights of the contracting parties under such contract of charter party; this objection to apply, without repetition, by consent, to all testimony of a similar character.

A. He cautioned them that in case she did not carry that quantity that the loss would be very heavy.

F. LAZURTEGIN, sworn for libellants, says:

By Mr. GURLEY:

Q. What is your business?

A. I am clerk for this firm of Gomila & Co.

Q. Have you charge of the charter-party department of that firm?

A. Yes, sir.

Q. What do you know about the charter party of the steamship Deronda?

A. I know it was given to Mr. Bangtson after the ship began loading.

256 Q. Are you sure the ship had begun loading before it was given to Bangtson?

A. Yes, sir; I notified Mr. Bangtson myself.

Q. Do you know how much the Deronda had on board at that time?

A. She had in the neighborhood of twelve thousand bushels.

Q. Was the charter party endorsed when you gave it to Mr. Bangtson?

A. No, sir.

Q. Were you present when that charter party was made—when Mr. De Wolf and the captain of the vessel were there?

A. Yes, sir; I was.

Q. Do you know whether or not this document marked "Gomila No. 1" was shown to them at that time?

A. Yes, sir; I handed it to them myself.

Q. Did the captain and Mr. De Wolf see that document?

A. Yes, sir.

Q. Did any conversation occur about it?

A. I heard some of the conversation.

Mr. McConnell objects as above to the testimony of this witness on the subject of any parole proof whatever to vary the contract or to enlarge or contradict the charter party.

WITNESS: I heard some of the conversation. Mr. Gomila wanted to instill it into Mr. De Wolf and the captain that the vessel must carry ten thousand quarters; otherwise he could not use the ship.

Q. You say you handed that contract marked "Gomila No. 1" to whom?

A. To Mr. Gomila.

257 Q. Did you see him hand it to Mr. De Wolf and the captain?

A. I saw Mr. Gomila reading it to the captain and Mr. De Wolf.

Q. Do you mean that you saw him read it or heard him read it?

A. I handed it to Mr. Gomila and heard him read it.

Q. Then he read it aloud?

A. Yes, sir.

Q. Was there anything said as to what would be the result if the ship did not carry ten thousand quarters?

Mr. McConnell objects as above.

A. The only thing I heard Mr. Gomila say was that it would be a great loss to the firm, because that he had a contract that could not be carried out otherwise.

Cross-examined by Mr. MCCONNELL:

Q. What date of the month was that or day of the week?

A. To the best of my recollection, it was on the 18th of June.

Q. Have you any way to fix it in your mind what date it was?

A. No, sir.

Q. Why do you say it was the 18th of June?

A. Because the vessel began loading at that time or about that time.

Q. You have nothing to fix the date in your mind?

A. No, sir.

Q. What time in the day was it?

A. I cannot say.

258 Q. How close were these parties to your desk when they were reading this?

A. About the distance from here to that safe—ten feet.

Q. Is your desk in the same part of the room as Mr. Gomila's desk?

A. Yes, sir.

Q. Did you not hand Mr. Gomila some other paper besides this contract?

A. Not that I recollect.

By Mr. GURLEY:

Q. What is it you said was about the 18th of June; was it the signing of the charter party, or what?

A. That I gave the contract to Mr. Gomila.

LEON LABAT, sworn for the libellants, says:

By Mr. GURLEY:

Q. What is your business?
A. A clerk of the firm of Gomila & Co.
Q. What do you know about the charter party of the steamship Deronda, if anything?
A. I know that Mr. Gomila chartered that vessel from Messrs. De Wolf & Hammond.
Q. Were you present at any conversation relative thereto?
A. The only thing I know is that I saw the captain and Mr. De Wolf come into the office one day, and Mr. Gomila showed them a contract that he had.
Q. Look at that paper, marked "Gomila No. 1," before you and state whether that was the paper or not.
A. Yes, sir; it was written by me.
Q. And signed by E. Forestier & Co.?
A. Yes, sir.
259 Q. You say that was shown to whom?
A. To Mr. De Wolf and the captain.
Q. What was said about it?
A. I do not remember exactly.
Q. Well, the substance of it if you cannot remember it exactly.
A. I saw Mr. Lazurtequi get this document out of the safe and show it to these gentlemen. At that time I was busy, and it was left to the discussion of Mr. Gomila and these gentlemen.

Cross-examined by Mr. MCCONNELL:

Q. You saw him hand this paper to whom?
A. To Mr. Gomila.
Q. You saw Mr. Lazurtequi do that?
A. Yes, sir.
Q. How near were you to them when he handed it to Mr. Gomila?
A. As close as I am to you—about three feet.

Mr. McConnell makes the same objection to this testimony as above stated.

LUTHER ALFRED, sworn for the libellants, says:

By Mr. GURLEY:

Q. What is your business?
A. Weighmaster on one of Gomila & Co.'s elevators.
Q. Are you not also superintendent of the elevator?
A. Well, I have charge of that at times.
Q. Do you know anything about the steamship Deronda and the chartering of her to Gomila & Co.?
A. No, sir; I don't know anything about the chartering.
260 Q. Do you know anything about the loading of her by Gomila & Co.?

A. Yes, sir.
Q. What did you have to do with the loading of that steamship?
A. I was instructed to go alongside the steamship Deronda and give her so much grain.
Q. When was that?
A. That was in June last; June 28th, 29th, and part of the 30th we were loading her.
Q. Who instructed you to do that?
A. Gomila & Co.
Q. Then you proceeded with Gomila & Co.'s elevator to the ship for the purpose of loading her?
A. Yes, sir.
Q. Did you have to wait for any inspectors' certificate or for the inspectors to pass the vessel?
A. We are generally told by the mate or captain, when the inspectors are not there, when the vessel is ready for cargo.
Q. After she was ready, commenced to load?
A. Yes, sir.
Q. Before you commenced to load were you informed that the vessel was ready to load?
A. Yes, sir.
Q. Who by?
A. I think it was the mate.
Q. Either the captain or mate?
A. Yes, sir.
Q. Then you proceeded to load her after they had informed you that she was ready?
261 A. Yes, sir.
Q. How did you load the vessel?
A. We gave her a certain amount of bulk and then in sack and store.
Q. What quantity did you give her each day?
A. Well, I have, perhaps, within a fraction of the quantity each day. On the 28th we began at five minutes past nine o'clock in the morning.
Q. You gave her grain that day up to what time?
A. Ten minutes past eleven in the day time.
Q. How much did you give her?
A. Twelve thousand two hundred (12,200) bushels.
Q. Why did you stop then?
A. I think it was raining at the time.
Q. When did you begin again?
A. On the 29th at a quarter past seven (7.15).
Q. How long did you load then, continuously?
A. We worked until fifty minutes past four (4.50) in the evening.
Q. How much?
A. 39,940 bushels and five pounds.
Q. Why did you stop then?
A. We completed the barge at that time.
Q. That is, you emptied the barge?
A. Yes, sir.

Q. When did you commence again?

A. The same day, the 29th, we had another barge, and we started again at a quarter past five.

262 Q. How long did you work continuously again?

A. We worked until forty-five minutes past six (6.45).

Q. How much did you put in at that time?

A. Six thousand bushels.

Q. Why did you stop then?

A. We stopped then for supper and continued the same night, starting at ten minutes past eight (8.10).

Q. And worked until when?

A. Half past eleven (11.30).

Q. How much did you put in in that time?

A. Well, it was booming up; it was very slow work.

Q. Seven thousand and forty-two bushels and forty-eight pounds (7,042.48); why did you stop then?

A. It was midnight; the men were tired and they discontinued the work.

Q. When did you commence again?

A. On the morning of the 30th at forty minutes after six (6.40).

Q. And continued to work until when?

A. Twenty minutes after three (3.20).

Q. How much did you put in during that time?

A. We put in a quantity until the inspectors told us to stop, that the vessel had her draught, 17,405 bushels and five pounds.

Q. You stopped, then, by order of the inspectors?

A. Yes, sir; we are always stopped by the inspectors when she has a full cargo.

Q. Is that the custom?

A. Yes, sir.

263 Q. Did you pronounce her full all over?

A. Well, the words used were that she had the draught in, and to give her no more; that is all she wanted.

Q. Is that what he usually says?

A. Yes, sir; we were told to stop by the inspectors.

Q. Now, the barge which you were loading out of—how much grain was there left in it?

A. Well, there was between fifteen and seventeen thousand bushels. We put off that quantity—14,919 bushels—on the steamship Inventor from the same barge. Then she had a remnant of so much grain.

Q. Then this barge had ample to give the Deronda three or four thousand bushels more?

A. Yes, sir.

Q. Could you have put in the Deronda three or four thousand bushels of grain before midnight of that date?

A. Yes, sir; very easy.

Cross-examined by Mr. McConnell:

Q. Did you afterwards put in some more grain on the Deronda?

A. Yes, sir.

Q. When?

A. On the 13th of July.

Q. How many more bushels did you put in on the 13th July?

A. On the 13th July we started at forty minutes past one (1.40) p. m., and worked until five o'clock p. m.

Q. How many bushels did you put in?

A. Well, there was a little in bulk and the balance was
264 in sacks. The total was 3,126 bushels and a fraction—14 pounds.

Q. Is that all you put into the Deronda?

A. Yes, sir.

Q. What did that make her total quantity in bushels?

A. 85,714 bushels and 16 pounds.

Q. How much of that was over ten thousand quarters; how many bushels is it over ten thousand quarters? Mr. Bangtson has testified it was four hundred bushels over the ten thousand quarters. Can you give me the exact figures—how much over ten thousand quarters was in the ship?

A. I find it to be the exact quantity. I remember now that the captain told me not to give her a pound over the gross quantity of ten thousand quarters.

Q. Give the number of bushels.

A. 85,714 bushels and 16 pounds; that is the exact quantity.

Q. How, now, do you get at that? *Increase* that 85,714 into quarters.

A. At 480 pounds to the quarter I have multiplied the total quantity, 85,714 bushels and 16 pounds, by fifty-six pounds, which gives the same amount as ten — quarters in pounds.

Q. What was done on that ship to give room for this additional quantity of grain?

A. There was part of her coal bunkers—the coal was taken out of the forward part of one of the bunkers, and they built it up and partitioned it off from the coal, so as to get this required space to hold this quantity of grain.

Q. That did not give much trouble, did it?

A. No, sir; but it was quite a delay.

265 Q. How long a delay did it take just to do that?

A. I can tell you when we were ordered alongside the vessel—the 13th—and I think it was the same date we went to work.

Q. You were not there and did not see the work as it was progressing?

A. No, sir; I was on the elevator.

Q. The ship might have been ready for it long before you got there, for aught you know?

A. Yes, sir.

Q. How many bunkers was the coal taken out of?

A. A portion of one bunker—the forward bunker.

Q. Whereabouts was that bunker situated; what was the size of it, the forward part of which was thus made ready for the grain by taking out the coal?

A. I don't know the dimensions.

Q. Where was it situated?

A. I think it was part of No. 2 hatch that led into the bunker, but I am not certain — or whether it was a separate bunker hatch. Sometimes they have a hatch that they dump the coals into.

Q. About what space, length, breadth, and height, that was thus prepared for the reception of grain by taking out the coal from the bunker that you have described?

A. Well, it might be ten or twelve feet high. I don't know the height of the vessel. I had no reasons for taking the dimensions, as we have nothing to do with that.

Q. It might have been ten or twelve feet high. What was the width?

A. Well, it was the width of the vessel from side to side, and perhaps the depth may have gone down ten feet.

266 Q. What was the depth of it fore and aft?

A. Well, the depth of it was ten or twelve feet and the length of it eight or ten feet.

Q. The depth of it fore and aft of the vessel was ten or twelve feet?

A. Yes, sir; I had nothing to do with that, only to put the grain on the vessel.

Q. Under what deck was this bunker?

A. Under the fruit deck; that was the top deck.

Q. Do you know what quantity of coal was taken out of that bunker?

A. I don't know.

Q. You say that on the 28th you stopped on account of the rain?

A. I think it was the reason.

Q. How long did you stop?

A. For most of that day. We did not do any work on the 28th.

Q. Now, when did you first go to that vessel to load grain on her?

A. I think it was the date of the 28th that we moved there; sometimes we lie alongside of a vessel two or three days.

Q. Had you not gone there before that to see whether you could not load her?

A. I don't remember. I very frequently go on board vessels to see whether they are ready for cargo, but I don't remember this.

Q. What date did you take the barge there?

A. I think the barge came there very shortly after the elevator, but I cannot answer you, because sometimes the barge is there before the elevator.

Q. Do you recollect whether you took the barge or the elevator?

A. No, sir; I don't remember.

267 Q. What was the Deronda loaded with when she came into this port?

A. That I cannot tell.

Q. At that time that you were putting in the grain on the 28th, which hatch were you putting it in first, the forward or the middle hatch?

A. The forward one. It was into No. 2 hatch; that was the second hatch from the bow.

Q. How many hatches did she have, four or three?

A. They all have three; I don't know whether she had four or not.

Q. Were they not unloading salt from the Deronda out of the hatch on the 28th?

A. That I don't remember; I think she had salt on her when I think of it—I mean, I think she had a cargo of salt, but I don't remember.

Q. Why is that you cannot load grain if it rains?

A. Because the inspectors object to it; because it moistens the grain.

Q. They will not let you do it?

A. No, sir; we were stopped by the inspectors.

Q. Is that a rule of the inspectors, that they will not let you load grain after it rains?

A. Yes, sir; that was only a heavy shower when they told us to shut down and we quit elevating.

Q. That is entirely under the control of the inspectors?

A. Yes, sir; there is always one on board of a ship.

Q. Did the inspectors stop you when you were loading on the 28th, as you have stated?

A. Yes, sir.

268 Q. On account of the rain?

A. Yes, sir.

Q. Don't you know that that vessel was lightened also after the 30th June by having the water taken out of her water-ballast tanks, as well as by taking the coal out of her bunkers?

A. That I cannot say on my own authority. I saw the water coming out of her side.

Q. You saw the water pumping out of the side of the vessel?

A. I saw the water coming out of the side of the vessel, but from what source I don't know.

Q. You saw it coming from above, flowing into the river?

A. Yes, sir.

Q. How far was it above the water line of the river?

A. For three or four feet.

Q. That could not get out without being pumped either by hand or by steam?

A. Well, I don't know much about the engine-room of a steamer.

Q. If I understand, this vessel was loaded under the supervision and control of the marine inspector. What was his name?

A. Captain Baker, I think it was; he seemed te have control of it. Captain Tinley was there also, and Captain Conway, but Captain Baker seemed to have control of it.

Examination adjourned to Tuesday, January 29, 1884, at 3 o'clock p. m.

269 Testimony taken on behalf of libellants before John Devonshire, U. S. —, Jan'y 29, 1884.

Present: J. W. Gurley, Jr., & William Grant, Esqrs., for libellants; J. McConnell & J. R. Beckwith, Esqrs., for respondents.

FRANCIS RICKERT, sworn for the libellants, says:

By Mr. GURLEY:

Q. What is your business?

A. I am vice-president and acting president of the Teutonia Ins. Co.

Q. Was there any application made to you for insurance on the cargo of the steamship Deronda in June or July last; if so, by whom; what were the circumstances; did your company take the insurance; and, if not, why not?

A. There was an application made by the New Orleans Insurance Company to give it reinsurance on the cargo of the steamship Deronda.

Q. Was the application in writing?

A. Yes, sir.

Q. Have you got it with you?

A. I believe it may be there, but I think it was returned to the New Orleans Insurance Company when I refused to take the risk.

Q. Why did you refuse to take the risk?

A. In the first instance, when I learned the risk for 7 or 8 days I thought everything was right, but I found out there was some trouble on board the ship about the cargo, and our inspector, Captain Cooper, was not perfectly satisfied. I then sent round word to the New Orleans Ins. Co. that I could not carry that risk.

270 Q. What was the trouble?

Mr. Beckwith objects to all hearsay evidence in answer to this question.

A. The ship had not taken a sufficient cargo on board that she had contracted for, and they were going to make an effort, notwithstanding that she had her clearance papers, to put the amount of cargo that she was short on board by some means.

Q. What would have been the consequences of putting more cargo on board after the clearance papers had been issued, as you say?

A. They would either have to pump more water out of her water tanks——

Mr. Beckwith objects to this statement of the witness as irrelevant and hearsay, as to the condition of the state of affairs on board the ship, coming to him from information from others & not from personal knowledge and observation of the vessel in the vessel.

WITNESS: Or they would have to put out the coal to make room for that quantity of cargo—more that had to go on board.

Q. What effect would the pumping of the water out of the tanks and putting in more cargo on the ship, also the taking out of the coal, have upon the ship?

Mr. Beckwith objects on the ground that it does not appear that this witness is either a mariner, a ship-builder, or an expert
271 of any character, beyond, possibly, insuring and reinsuring.

Q. I mean, of course, so far as it concerns the insurance of the cargo.

A. Well, as far as my business is concerned, as managing president of the company, I have got to make it my duty to see and to know through our inspectors what trim the ship is in, and by pumping the water out of the tanks and taking out the coal to make room for more grain it makes the ship top-heavy, and when the ship has to go to 2 or 3 ports, putting in coal, as they have to do when they have it above, on deck, the ship is top-heavy and she is apt to go down.

Q. Does your experience in insurance before this teach you that such is the result?

A. Yes, sir; we have paid for it. We have paid for it in the case of the steamer Bellside, with the same captain.

Q. When was that steamship lost that you speak of?

A. Some three or four years ago.

Q. With the same master, did you state?

A. Yes, sir; the same master.

Q. Do you know the cause of the loss of that vessel?

Mr. Beckwith objects to the question on the ground that it is hearsay, and in the next place he does not care to try all the merchant marine either on account of incompetency or the accidents or misfortunes met with.

272 A. From what I have been told, for I was not on board, but from newspaper report, she was heavily laden and went into some northern port; I don't know whether it was Sydney or Halifax.

The answer of the witness is objected to on the ground heretofore stated, and it is agreed that the same objection shall hold to all further testimony given by this witness without repetition; also the objection of irrelevancy and hearsay as made is to apply in the same way.

WITNESS: Went into Sydney or Halifax and took coal on board. She got out into the middle of the Atlantic and by a heavy sea she was thrown on her beam ends and sunk.

Q. After this vessel had pumped out her tanks and taken out part of her coal and put in an additional quantity of grain what was her capacity for carrying coal relatively—I mean for the voyage she had before her?

A. There was no capacity hardly. She would have to make 2 or 3 landings and take coal on board to take her across the Atlantic. It was for that reason the insurance was offered to me a second time that I positively refused to underwrite a dollar on it.

Q. Where was she to coal for the last port or where would she have to coal for the last port?

A. Probably Sydney.

Q. Would she have space enough to carry the necessary coal from Sydney?

A. In my opinion, not. I think she would have to take coal
273 above deck. That was the reason I refused to write a policy on her.

Q. Are the rates of insurance the same when a vessel has to coal at one or two or more ports?

A. No, sir; if they were to go to Sydney the rate is one-half per cent. more.

Q. Is there any additional charge if they use an extra port?

A. We make a charge for every extra port, unless it is a port of call in the channel where they just receive orders or they lie off in the channel and receive orders, and then we do not make a charge.

By Mr. GRANT:

Q. Is it the general practice of all insurance companies to make this extra charge?

A. Yes, sir; we are governed by the rules of the New York Marine Mutual Insurance Association, of which our company is a member.

Cross-examined by Mr. MCCONNELL:

Q. What was the date of the application to you for reinsurance?

A. I cannot remember.

Q. Can you find out what date it was by any data in your office?

A. We cannot if the application is not in our office; if it was in the office we could.

Q. And your impression is it is not there?

A. My impression is it is not there; it was returned to Mr. Chalaron.

Q. How many days did you hold this application under consideration?

A. The moment I heard there was a cavil on board I notified the New Orleans company right off.

274 Q. How many days did you hold it under consideration?

A. The application was there 5 or 6 days before I found it out.

Q. Did you not have the risk in your office 5 or 6 days?

A. Yes, sir; the application.

Q. Then if a fire had occurred on board the vessel during these five or six days you would have to pay a portion of the loss?

A. Yes, sir.

Q. Do not your books show that?

A. No, sir; it is not on our books until we know distinctly what we are insurers on. Sometimes it is not to be over $10,000 or sometimes more, but a return of the whole must be made.

Q. Were you to take the harbor risk of the voyage, or were you considering the whole of the risk of the voyage, or either?

A. We had the risk for the voyage, and as soon as I found there was trouble I drew out and charged the harbor rates for the time I earned the risk.

Q. How much did you receive for that?
A. I don't know.
Q. But your books will show?
A. Yes, sir.
Q. Please inform us of how many days & how much you charged.
A. Yes, sir; I gave instructions to the marine clerk to charge the harbor risk.
Q. You received a premium in the harbor risk?
A. Well, I suppose so; that is a matter that appertains to the harbor clerk.
Q. You can get information?
A. Yes, sir; but not to-day, because the young man has
275 left the office by this time.
Q. What I want to know is the number of days and what charge was made and the amount received.
A. Yes, sir; I will send a statement of it to Mr. Gurley's office.
Q. Did you ever see the steamship Deronda?
A. No, sir.
Q. If I understand you correctly, your objection to taking this risk for the voyage of the Deronda was that by taking out the coal and putting in grain it would make the ship top-heavy?
A. Yes, sir.
Q. Was that the only objection?
A. That is the objection only that I would have from an insurance point of view.
Q. Was there any other objection?
A. And the water was pumped out, as my inspector reported to me.
Q. Is not that a part of the same objection, the water being pumped out?
A. Well, there was some thirty-five tons of water pumped out and the coal taken up. That was my objection.
Q. Was not your objection that all of that together would make the ship top-heavy?
A. Yes, sir.
Q That is, the pumping out of the water, the putting out of the coal, and the taking in of the grain?
A. Yes, sir. When a vessel goes to the last port for coaling—for instance, to Halifax—she would put so much coal on the top of her deck that she would be top-heavy, because they would have no room below for the coal.
276 Q. I want to get at your reason.
A. Yes, sir; that is the reason I refused to underwrite the policy the second time.
Q. Was the reason of your objection this, that the ship was top-heavy?
A. And that if she got in the trough of the sea she will run the same risk as the Bellside.
Q. By putting the coal on deck?
A. Yes, sir.

Q. If the coal was not put on the deck, then your objections would cease?

A. If the water was put below it would be in the same trim, but so much water below in the bottom of the ship and the coal on the top would make the ship cranky.

Q. Suppose the coal was not put on the deck, but suppose it was put into the coal bunkers of the ship and none left on the decks at all, would you then have insured *in* the vessel? Yes or no.

A. It depends altogether upon circumstances.

Q. What circumstances?

A. I want to know from my inspector if there is sufficient room in the coal bunkers to take sufficient coal to last across the Atlantic. I must know that from my inspector. I have Capt. Conway to attend to that part of the business, and he assured me there was not sufficient room for coal to coal the ship across the Atlantic.

Mr. McConnell objects specially to anything that Capt. Conway told the witness as hearsay and not evidence.

277 Q. You went entirely, then, if I understand you, upon the reports made to you by Capt. Conway, as inspector?

A. Yes, sir; we take no risk in any vessel unless our inspectors report on it and give us all the details of it.

Q. If Capt. Conway, then, had certified that ship as being ready—in every way ready—to go to sea on the voyage, then you would have had no objection to take the risk on her?

A. He would call my attention——

Q. Answer the question. If Capt. Conway, then, had certified that ship as being ready to go to sea on the voyage, then you would have had no objection to take the risk on her?

A. If, in my judgment, the ship was in proper trim.

Q. Then you would not have depended on Capt. Conway's judgment?

A. Capt. Conway reports to me and on his report I act. I take no insurance unless he reports.

Q. Suppose Capt. Conway reported to you that the ship was ready for the voyage in every respect, would you take the risk in the ship, on the cargo on the ship, then, or not?

A. Capt. Conway reported so at first, but there was a change in it subsequently, and I refused to take it.

Q. Answer. Suppose Capt. Conway reported to you that the ship was ready for the voyage in every respect, would you take the risk on the ship, on the cargo on the ship, or not?

A. I would not unless I was satisfied that the ship was in good condition to go to sea.

Q. Well, you sit in your office and have reports made to you as to her condition by Mr. Conway?

A. Yes, sir.

278 Q. My question is not if you are satisfied; you sit in your office and do not see the ship; you say you do not see the ship?

A. Yes, sir; I say so; I do not see the ship.

Q. If Capt. Conway had reported to you officially that the ship was in every way fitted to go on the voyage with the cargo on board would you not have taken the risk on the cargo?

A. If he had done so and I felt satisfied with his report I would have done so. Capt. Conway very often reports to me vessels going down to South America and that the vessels were in good condition, but I concluded not to take the risk for various reasons.

Q. There are other reasons, then?

A. Yes, sir; for instance, this captain had lost a ship in the middle of the Baltic, and that is the reason I did not take her.

Q. That is the Bellside?

A. Yes, sir.

Q. You know that from hearsay?

A. That is, by paying the loss.

Q. Is it the same captain that was in the Deronda that was in the Bellside?

A. Yes, sir.

Q. When did the Bellside leave here on the voyage she was lost?

A. 3½ years ago.

Q. What was it caused her loss at sea?

A. Well, I can only go by report, and as that is not evidence there is no use in repeating it.

Q. Do you know that she was lost by having the coal on her decks?

A. I don't know that; I only know by hearsay.

279 Q. If a vessel has a right by her charter party to coal at several ports between here and Europe would that prevent you taking a risk on her, or would it simply make you raise your rates of insurance?

A. That would not prevent me taking the risk on her.

Q. You would increase your rates?

A. Yes, sir.

Q. What rates would you fix on a vessel if you had such a vessel brought to you; how would you determine the risk while the vessel was being loaded; what is the rule governing underwriters on that point?

A. If she is going to Sydney it is a half per cent.

Q. But suppose she does not say she is going, but the charter party gives her the right to coal at a port or ports?

A. We must know beforehand; otherwise we hold the parties here or the agents of the ship for the difference; it is so entered in the application.

Q. Do you require a vessel to state in advance where the vessel is going to coal at—what ports?

A. We have to know that.

Q. Suppose the charter party gives the right to the ship to coal at a port or ports without naming them, does your company require the captain or the agent of the vessel, before effecting insurance in the voyage, to name the ports she will coal at and to name the ports?

A. We have nothing to do with the charter party.

Q. I would like to have an answer whether the charter party is required to name the ports that she is to coal at.

280 A. I would want to know the names of the parties insuring the cargo.

Q. You will not take it unless they do?

A. Unless they give to what ports, and it amounts to more the more ports she goes to.

Q. You will not take it otherwise?

A. Unless the ship is ready to go to sea, in every respect seaworthy, we will not.

Q. Did this steamer Bellside have a collision with another vessel?

A. I don't know; she may have had a collision before she went out of this northern port, where she loaded coal. I am not aware that after she left that port she had any collision.

Q. Did you not have part of the risk on the cargo of this steamship Deronda?

A. No, sir; I positively instructed my marine clerk not to take the risk at the second time when she was reloaded and refitted. My marine clerk came to me and asked me whether he would take the risk or not, as she was about proceeding to sea, and I told him no, no matter what the rate was.

Q. Do you know that the cargo was insured in this port?

A. I do not.

Q. Were you ever invited the second time to take insurance on it?

A. Yes, sir; I beg your pardon; I was asked.

Q. Who asked you?

A. Mr. Chalaron, the marine clerk of the New Orleans Insurance Co.

281 Q. Do you know the date that was?

A. No, sir; I did not take a memorandum of it. I refused to take the risk. These things happen almost every day.

Q. Did not Mr. Chalaron insure that risk, the insurance in this vessel?

A. I don't know whether he did or not. I know he made application to me to make reinsurance.

Q. Did not that imply that he had made the insurance and wanted you to take a part?

A. He might have taken it and tried to reinsure it. We often try to place a whole cargo in the market here, and if we cannot we refuse to take it.

Q. You say that you are sure he did not take the insurance in the cargo?

A. No, sir; I am not. I heard a report about it from Europe afterwards.

By Mr. BECKWITH:

Q. How many years have you been at sea?

A. It is about 9 years ago I went to Europe and came back again.

Q. Did you ever command a vessel?

A. No, sir.

Q. Were you ever a sailor?

A. No, sir.
Q. Were you ever a stevedore?
A. No, sir.
Q. Did you ever stow a ship or superintend the stowing?
A. No, sir.
Q. Where did you get your knowledge or information relative to stowing and the effect of the various kinds of stowing, whether
282 it made them top-heavy or not?
A. I have got my information principally since I have been in the insurance business.
Q. The second man from you, the marine inspector, I suppose?
A. Yes, sir; of course, as far as he can give me information, but I get my information principally from marine books written for that purpose, and that I have in my office, to instruct the president to keep an eye to this or that, and by them I am governed.
Q. Will you tell us how many cubic feet 35 tons of water will occupy?
A. That is not a proper question for you to ask me; I have not been summoned here for that purpose, to make any arithmetical calculations, but I am ready to answer you otherwise.
Q. I am to understand that you don't know.
A. You can put the best construction you can on it.
Q. Tell us what space 35 tons of grain will occupy.
A. I refuse for the same reasons I gave a little while ago.
Q. You stated with a great deal of certainty that the pumping out of the water and putting in grain will make the ship cranky.
A. Well, your common sense will tell you that pumping the water out of the bottom of the ship and putting in grain will make a ship top-heavy.
Q. That gives you to understand that a vessel loaded down with grain to within four feet of her plank-sheers or deck is any more cranky with one cargo than another?
A. I give you my information.
Q. Do I understand you to say that a vessel loaded down,
283 say, to 20 feet with grain would be more cranky than she would be than if she was loaded the 20 feet, part of her cargo being 35 tons of grain in her water tank?
A. It would make her so much more cranky when the water was taken out.
Q. Which is the heaviest—the 35 tons of grain or the space that the 35 tons of grain would occupy filled with water?
A. That puts me in mind of a case when I was a school boy, which was, Which is the heaviest, a pound of feathers or a pound of stone?
Q. Is there any difference in the cargo as to the crankiness of a ship?
A. There is a great deal of difference.
Q. Is a grain cargo a cargo calculated to make a ship cranky?
A. We are not speaking about cranky; we are speaking about top-heavy.

Q. Well, that is precisely the same thing. If you want the word top-heavy we will use the word top-heavy.

A. If you will use all the bottom with other stuff and put sugar and molasses on the top the ship will be top-heavy.

Q. Now you see the necessity of telling me the difference between 35 tons of grain and the weight of that much water which would fill up its space in the water tank. You see it is a material difference.

A. It is useless for you to talk; our inspector told me that 35 tons of water were pumped out and 108 tons of grain were put in; therefore something must have been the matter. You cannot put
284 in 108 tons of grain where you had only 35 tons of water; something must have been empty.

Q. How do you know that they did not take out more than 35 tons of water out of the ship?

A. I have only got that from hearsay, as reported to me.

Q. Do you know how many tons burden the Deronda was?

A. No, sir; I can know by referring to my books, before—I have got the registry in my book.

Q. Do you know how much space of her hull was given to her coal-bunker stowage?

A. Only what I got from hearsay.

Q. How large were they?

A. Well, I say there is no use in my repeating it.

Q. I am now asking you your knowledge from hearsay what the size of the coal bunkers were. You know nothing else?

A. No, sir; I cannot tell you about it.

Q. How do you know that she could not carry coal enough to take her across the Atlantic?

A. Because the inspector told me.

Q. Do you know from hearsay or any other source how much she would burn an hour?

A. My inspector told me that she could not carry enough to go across.

Q. You never inquired the size of her bunkers?

A. No, sir.

Q. You never inquired the amount of coal?

A. Yes, sir.

Q. How much?

285 A. I don't know, but we inquired about the amount that would be necessary to cross the Atlantic.

Q. You said if the vessel called at Sydney she would be compelled to take coal on her deck; how do you know that?

A. That is what my inspector told me.

Q. You have no knowledge that she would not carry under deck enough coal to take her across the Atlantic?

A. No, sir; only what the inspector reported.

Q. Tell us how many cotton and grain ships carrying out of port cargoes and go to sea without coal on the decks; what proportion of them.

A. Well, if I knew it, if our inspector calls my attention to it, I would not write a policy on that cargo.

Q. Do I understand you to say that you have never knowingly underwritten a vessel going out of this port with coals on her decks?

A. With coals on her decks in going to make a port of call.

Q. Have you never knowingly underwritten a ship going out of this port to a port on the other side with coal on her decks?

A. Not that I am certain of, but one thing I am certain of, that I would not write a policy on such a ship if I knew it.

Q. If it is a common practice for vessels going from this port to ports on the other side to leave with coals on the deck, you don't know it?

A. No, sir; I wish to state that we have had ships cleared here in the custom-house, and during the day after our certificate had been issued, payable in Europe, they have worked all night in putting
286 cotton on the deck, as also coal, and then clear out the next morning early in a clandestine manner.

Q. I understand you to say that you withdrew your reinsurance on the Deronda because they were disturbing the cargo after the clearance papers were granted. Do you mean the custom-house clearance papers?

A. Yes, sir.

Q. Do you know when they were granted?

A. No, sir; I don't know.

Q. Do you know, or can you assert from hearsay or any other source, that the cargo of the Deronda was touched or disturbed, increased or diminished, after she cleared from the custom-house?

A. Her cargo was partially discharged and so much more taken on board afterwards.

Q. You are perfectly certain that you got from your marine inspector that additional cargo was put on board the Deronda after she had cleared from the custom-house?

A. Yes, sir.

Q. And you did not revoke your conditional underwriting on the additional insurance on that cargo until after you had that information?

A. No, sir; that was the second time that I refused it. I refused it before that.

Q. Did you ever take any pains to ascertain when the ship did clear from the custom-house?

A. I knew it at the time.

Q. By hearsay?

A. By reading it in the paper, if I am not mistaken.

Q. Are you willing to state your impression or belief, predicated on your information or from the inspector's report or hearsay,
287 that the cargo was disturbed or increased on the Deronda after she cleared?

A. Yes, sir.

Q. Will you tell us what is the form of this application for reinsurance used by the New Orleans Insurance Company, and what should it contain?

A. It contains nothing but simply the application to cover the excess or not to exceed a certain amount on board such & such a ship, whatever ship it may be.

Q. Did it state in the paper the relation the New Orleans Ins. Co. held to the ship and cargo; whether they were insured or not?

A. Nothing of the kind.

Q. Did it state whether he was the real party in interest for whom the New Orleans Ins. Co. had insured?

A. No, sir; nothing at all of that.

By Mr. McConnell:

Q. Did you ever see the captain of the Deronda?

A. No, sir.

Q. You would not know the man if you saw him? Do you know his name?

A. Eldridge.

Q. What is his Christian name?

A. I don't know. I don't recollect it now

Q. Did you ever see the steamship Bellside?

A. No, sir.

Q. When you say it is the same captain of the same ship you only state what you heard from others?

A. Yes, sir; reports from others.

288 Q. And the newspapers?

A. Yes, sir.

(See Rickert No. 1.)

Document Marked Rickert No. 1.

Teutonia Insurance Company.

Please enter on open policy No. 58.

Name of vessel.	From—	To—	On what am't.	Rate.	Premium.
S. S. Deronda.....	N. O.	.....	Corn, 10,000.	Not to exceed 3-16 net.	18 ⅝

Harbor risk.

With privilege to tranship on other good steamboats.

☞ Not covered if stored.

S. A. CHALARON, *Applicant.*

New Orleans, June 28, 1883.

Wm. H. De Wolf recalled for continued cross-examination:

By Mr. McConnell:

Q. Will you please look at that document and state whether that came from your office or in whose handwriting it is?

A. That is my handwriting.

Q. Was that letter sent to Gomila & Co. at the date it was written?

A. Yes, sir; the 12th July.

Q. Did you write that letter on the 12th July, 1883?
A. Yes, sir; that is a copy of the letter wrote to Messrs. Gomila & Co. on the 12th July.

289 Mr. McConnell offers in evidence letter marked C No. 1.

Q. Will you be good enough to look at that document and state whether that is the original document sent to you by E. Forestier & Co. or not?
A. Yes, sir.
Q. And whether it was received by you on that date or not?
A. I did receive it on that date.

Mr. McConnell offers in evidence the letter marked "C No. 2," which reads as follows:

NEW ORLEANS, *July* 5, 1883.

To Messrs. De Wolf & Hammond, agents of the English steamship Deronda, New Orleans.

GENTLEMEN: We confirm our letter of this morning. Upon visiting the steamship Deronda this evening, about 4 p. m., in company with Capt. Baker and Mr. Torrey, we were surprised to see that the mate and crew & the stevedore employed by the officers of the vessel were illegally and improperly shifting the cargo & bulking it between decks, contrary to the rules of the underwriters & customs of this port & directly against the orders and directions of the marine inspector.

We most emphatically protest and warn you, as agents of the owners, against this and all other illegal and improper action concerning said cargo.

Heavy damages have already arisen in this matter and are hourly increasing, for which we look to and will hold said vessel
290 and her owners.

Respectfully, E. FORESTIER & CO.

Q. Look at this document and state what it is.
A. This is the marine surveyor's certificate that the ship is ready for cargo.
Q. What is the date of it?
A. New Orleans, 29th June, '83.
Q. Who is it signed by?
A. Signed by W. M. Baker, surveyor.

Mr. McConnell offers in evidence the letter marked "C No. 3."

Q. According to this statement the vessel was ready then for the receipt of her cargo—grain in bulk and sacks—according to the rules of the National Board of Marine Underwriters; was she not ready before that?
A. No, sir.
Q. Why not?
A. Because she had not her cargo out.
Q. What cargo did she come here with?

A. She had salt and fruit; I think she had 1,000 tons of salt on board.

Q. I see that the charter party states "lay days to commence the day after the steamer is declared ready to receive cargo;" was that the certificate of the surveyor of grain vessels, called for by the charter party?

291 A. Yes, sir.

Mr. Grant objects to an opinion of law by the witness.

Q. Was that the paper, then, which fixed when the lay days commenced under the charter party?

A. The lay days commenced after we got that certificate, according to the charter party.

Q. So the lay days did not begin until the 30th of June?

A. Yes, sir.

Q. You did not get the certificate of the surveyor of grain until the 29th?

A. Yes, sir.

Q. Was there any other surveyor of grain on that vessel that could have given the certificate besides W. M. Baker?

A. No, sir.

Q. Was he the only surveyor that had that work in charge at that time?

A. Yes, sir.

Q. There was no other person to give any other paper?

A. Yes, sir.

Q. There was no other person who could fix the lay days but that man, the surveyor?

A. Yes, sir.

Q. On the 30th of June?

A. Yes, sir; according to the charter party.

Q. I see the 14th clause of the charter party contains a blank which is not filled up, and is as follows: "Should the steamer not be ready to load at New Orleans on or about the —— the

292 charterers or their agents have the option of cancelling this party." Why was this blank not filled up?

A. Well, I will explain that to you. When I commenced negotiating with Mr. Gomila——

Mr. Grant objects to the answer unless the witness shows that Mr. Gomila was connected with it.

WITNESS: For the charter of the steamship Deronda, on the 16th day of June, the cancelling date was arranged to be the 25th day of June; that the ship was to be ready to receive cargo or the charterer would have the option of cancelling the charter. On the 18th of June, when the captain and myself went to Mr. Gomila's office to arrange with him respecting the guarantee of the 10,000 quarters, and when we had this all arranged I asked Mr. Gomila if I should put in the cancelling date, which I had cabled as the 25th June. The captain objected to this, as he said he had his cargo to get out and he could not get his ship ready by that date. Mr. Gomila said it made no

difference about the cancelling date, as the ship was now here in port, and he knew the captain would use due diligence to get the ship ready in time to receive his cargo. The captain replied that he would do so, and that is the reason why that cancelling clause was left out of the charter party. I produce here a copy of the telegram I sent, which is Mr. Gomila's offer of that date. It was made in our office; you have already a copy of it among the other telegrams.

Q. You have testified in your examination already in re-
293 gard to a grain contract from Gomila & Co. to Messrs. Forestier & Co., dated June 7, 1883. You have testified in regard to that paper, if I understand you, that you had not seen that contract before?

A. Yes, sir; I did.

Q. Can you recall now any time you ever have seen it?

A. I never have any remembrance of having seen it. I do not remember Mr. Gomila having sent it to me. When I went to Mr. Gomila's office with the captain of the Deronda Mr. Gomila and the capt. were sitting at his desk figuring up, as regards the space, whether the vessel would carry the 10,000 quarters. I was sitting at the desk back of Mr. Gomila and I was also making the same calculation. Mr. Gomila may have shown the contract to the captain; he may have read it to the captain; I do not dispute it, but I have no knowledge of having seen it or of having Mr. Gomila show it to me. I would like to know, however, what has this to do with the charter party?

Q. You say that Mr. Gomila and the captain were figuring to see how much the ship would carry?

A. Yes, sir; to see whether she had the space for the 10,000 quarters.

Q. So that that figuring was done in Mr. Gomila's office?

A. Yes, sir.

Q. Between the captain and Mr. Gomila?

A. Yes, sir; and Mr. Gomila asked the captain if he had not some plan on board the ship that would show the compartments; that if they had that they could tell whether the ship would carry the cargo or not and whether there was space enough on the ship for it.

Q. Did the captain send and get that?

294 A. I went up with the captain of the ship to the ship and got the plan and we returned to Mr. Gomila's office with it, and he and Mr. Gomila then figured up whether there was sufficient space to take the 10,000 quarters, and they came to the conclusion that there was room, and to spare.

Q. Who did the figuring in that matter—Mr. Gomila or the captain?

A. They both did it together, Mr. Gomila and the captain. I wish to state now why there was figuring up about this. When the owners cabled back to me on the 18th day of June, in reply to Mr. Gomila's offers about the guarantee, I sent over Mr. Gomila's telegram asking about the 10,000 quarters, and they stated in that

cable message that I could guarantee 10,000 quarters, provided the captain would agree to the quantity.

Q. Would agree that the ship would carry that quantity?

A. Yes, sir; exactly.

Mr. Gurley objects to this testimony so far as it may happen to vary from the telegram itself.

WITNESS: On the 18th day of June, before going to Mr. Gomila's office and when I had received the cable reply that I might close the ship guaranteeing 10,000 quarters, provided the captain would agree to that quantity, I telephoned to Mr. Gomila and said I had a cable reply to close her at 5 and 9 pence and to guarantee 10,000 quarters, provided the captain would agree to the quantity, and Mr. Gomila said that he would take the ship. I said the ship had arrived that morning, but the captain had not been at the
295 office, but as soon as he came in we would go to his, Mr. Gomila's, office, when we would decide about his guarantee and whether the captain would agree to it or not. When we went to Mr. Gomila's office and talked the matter over, Mr. Gomila said he did not want the ship if it did not carry the 10,000 quarters. I think the expression he used was, "It was no use to him." I think the captain had a hesitancy to guarantee the 10,000 quarters, and for this reason Mr. Gomila and himself went into a calculation to see whether there was space for them to take it or not, and we there decided that there was space to take this cargo. Mr. Gomila dictated a telegram in his office or a cable message to the owners that it was the captain's opinion she would carry the 10,000 quarters, and that we had closed the ship. You have a copy of the cable message that I sent to that effect. We then had some more conversation with respect to the guarantee. I wanted Mr. Gomila to put some penalty in the charter party. Mr. Gomila objected to put that in, as he said it was a matter for the owners to decide. He then said he was trying to charter the steamship Finsburg, that was bound here; he knew that she would carry the cargo, and in that case he would not hold the captain to the guarantee, but he would send the vessel to Cork for orders at 5 and 3 pence and send the cargo to another port. We then left the office; we went to our office and sent off the cable.

Q. Was there any other ship in this port at that time that was available for shipping that cargo to the place where this grain was going to?

296 Mr. Grant objects.

A. Not at that time, to the best of my knowledge and belief, for the reason that Mr. Gomila was trying to get that steamship Finsburg and he could not get her; that was the only steamer that I know of. Mr. Gomila said he was trying to get that steamship and he could not get her. Ross, Keen & Co. got her.

Q. How is it that you know that there was no other vessel here that you could get for that shipment of grain?

A. Because I was trying to get steamers for Mr. Gomila; cabling every day for steamers. He was at the office every day and sometimes twice a day.

Q. If I understand you, there was not many steamships in this port that sail in that direction?

A. What direction?

Q. Where this grain was to be shipped by Mr. Gomila.

A. No, sir; we would have to charter a steamer there.

Q. Here is a paper signed by De Wolf & Hammond, dated July 16th.

A. We wrote this letter; this is a copy, but signed by myself.

Q. Was that paper delivered to Messrs. Gomila & Co. and E. Forestier & Co.?

A. Yes, sir.

Q. On its date?

A. Yes, sir; on that date.

Mr. McConnell offers in evidence letter marked "C No. 4."

It is admitted that these papers were left at the offices of Gomila & Co. & E. Forestier & Co., respectively, namely, papers marked B 2, B 3, dated July 6, 1883; also paper marked B 4, dated July 7, 1883.

After which the examination was adjourned to Friday, —— 8th, 1884, at 2 p. m.

297 GOMILA & CO. *vs.* CULLIFORD & CLARK.

NEW ORLEANS, *Feb'y* 8, 1884.

Testimony for libellants resumed as per adjournment.

Present: J. Ward Gurley, Jr., & Wm. Grant, Esqrs., for libellants; J. McConnell, Esq., for respondents.

It is admitted that the books of the New Orleans Ins. Co. show that the cargo of the steamship Deronda was insured by E. Forestier & Co. according to the following memorandum filed by the clerk of said Ins. Co., Mr. Hincks.

Memorandum.

June 30th.—Entered July 13, 3–2. Pol. 681,335. Deronda. N. O. to Elsinore, for orders to Copenhagen or Aarhun, with priv. of coaling ports, in name E. Forestier & Co., on 82,588 bus. corn (No. 2 mixed), sail grade, in bulk and ship's bags, F. F. P. A. E.; c. value, $48,950; at $2\frac{1}{2}$ net prem., $997 net. Pol. 6,814, same on $82.588\frac{2}{5}\frac{2}{6}$ bus. No. 2 mixed corn, sail grade, in bulk & ship's bags, F. F. P. A. E., c. capital, $5,175; at 2 net pr., 103.50 net.

B. F. BANGSTON recalled for further cross-examination.

By Mr. MCCONNELL:

Q. You took out a policy of insurance on the 30th of June on the cargo of the Deronda in the New Orleans Ins. Co., did you not?

298 A. Yes, sir.

Q. In the name of E. Forestier & Co.?
A. Yes, sir.
Q. On 82,588 bushels corn, at a valuation of $48,950?
A. Yes, sir; I believe so.
Q. I have the above memorandum from the clerk of the office that you paid the premium on the 10 Aug., 1883?
A. Yes, sir.
Q. What did you do with that policy of insurance?
A. We gave up that, with all the documents we had, to the bankers.
Q. What bankers?
A. The Union National Bank.
Q. Was there more than one policy issued on this cargo that you know of?
A. Only one, in duplicate.
Q. And that was to E. Forestier & Co.?
A. Yes, sir.
Q. Did E. Forestier & Co. ever assign that policy to anybody else; did you ever write on the back of the policy?
A. No, sir; only our endorsement, E. Forestier & Co.
Q. That was the only endorsement on the back of the policy ever at any time that you know of?
A. Yes, sir; that I know of.
Q. When did you give it to the Union National Bank?
A. It was when the ship was fully loaded.
Q. When you sold the bank your exchange?
A. Yes, sir.

By Mr. GURLEY:

299 Q. Suppose a cargo does not come up to the stipulated quantity, what is the result as between the buyer and the seller?
A. The buyer gives up to the seller, and the contract is null, under the usual reservation of damages.
Q. Is that the universal custom?
A. Yes, sir; it is.

Mr. McConnell objects to this testimony on the same grounds as heretofore stated.

300 United States District Court, Eastern District of Louisiana.

GOMILA & Co. *vs.* CULLIFORD & CLARK. } No. 11965.

Testimony taken on behalf of respondents before John Devonshire, United States commissioner, this 5th day of February, 1884.

Present: James McConnell and J. R. Beckwith, Esqrs., for respondents; J. Ward Gurley, Jr., and William Grant, Esqrs., for libellants.

JOHN BEATTIE, sworn for the respondents, says:

By Mr. McCONNELL:

Q. What is your occupation?
A. Stevedore.
Q. You reside in the city of New Orleans?
A. Yes, sir; since 1846.
Q. How long has this been your occupation?
A. Thirty odd years.
Q. Do you do business for the house of De Wolf & Hammond?
A. Yes, sir.
Q. Do you know anything about the loading of the steamship Deronda in June last, or the latter part of that month?
A. Yes, sir; I do.
Q. Did you have occasion to see the steamship while she was being loaded?
A. Yes, sir; I done part of the work on her.
301 Q. What part of the work did you do?
A. I discharged the salt on her.
Q. You discharged her when she came into this port?
A. Yes, sir; a good part of it. An Italian stevedore discharged the sulphur and fruit first. He works for Macheca, a fruit dealer, and I discharged the salt.
Q. What time did you get through discharging the salt?
A. I would not be positive, because I do not just put it down; some time in June; towards the latter end.
Q. You don't remember the date?
A. No, sir; I know I got through with the loading of her—that is, my part—after I had discharged between decks. I got through with my discharging part before the 4th of July, because we had a little party, before we put the cargo on board, the 4th of July night.
Q. Did you load the grain into that steamship?
A. I did not. Jake Neeb loaded the grain and the captain of the elevator.
Q. Who is Jake Neeb the stevedore of?
A. Gomila & Co. He keeps a coffee-house at the corner of Ninth and Tchoupitoulas streets; he is a German.
Q. What part did you do, then, if you did not do the loading of the grain on the ship; what were you called on to do?
A. I was called on to do this. The captain — to me and said, "The ship is a big mistake;" and he said, "What, do you think the ship is properly loaded?" And I said "No; she is not." He asked me if she was properly loaded, and I said, "No; that I could put that cargo into her." "Well, then," he said, "go and break her up
302 and put the cargo into her." This conversation occurred after the ship was already loaded by Mr. Gomila's stevedore. The ship was away down by the head and not in trim. The captain asked me what I think of it, and I said it was a bad job; that the ship was out of her trim. She was down by the head, not having the cargo stowed even. So I spoke her out. The inspector

came there and examined, and allowed the grain was out. The captain of the elevator objected. He knew, he said, there was some new grain in the sacks, and he would bet me a new hat that I would not be able to put it back again. I bet him a new hat, and after I broke out the after between decks I put in fifteen hundred more bushels than there was there before and left a space away for five or six hundred bushels of grain after it was loaded. Then I would not do anything more to that ship. I said, "Let them put the rest into bags by themselves." So they went on and put it in themselves.

Q. Who did put it in?

A. Jake Neeb and this man at the elevator finished the loading. He put in the little that was to go in, so many bushels or bags.

Q. This part of the ship where you say you took out part of the grain and put in fifteen hundred bushels more than was there before—what part of the ship was that?

A. No. 3 and No. 4 hatches, in the after part—in the between decks.

Q. Explain to me how you succeeded in getting that much more space.

A. The same as I would with a bale of cotton. If I take four big bales of cotton and put them in such a place and I see that
303 they do not fill up the space properly I break them out and go and pick my cotton and put in five bales in the same space; so when I could not get a full sack into the space I put in half a sack, and if I could not get in half a sack I put in a quarter of — sack. I filled up all the holes that were there, because when I went into her the ship was not stowed at all. Afterwards the captain wrote to me that when the ship got into the North Sea the cargo shifted all on one side and the ship lay on her beam ends until she got to Copenhagen.

Q. What does the shifting of a cargo prove?

A. If a ship is well stowed a cargo will never shift, which shifting of the cargo causes many a good ship to go to the bottom. If a ship keeps on her beam ends she will fill in time and turn over.

Q. That shifting of the cargo showed that she was not fully stowed?

A. No, sir; she could not be fully stowed in the lower hold nor in the between decks, because if she was that grain would not have went to one side. Many a good ship is lost that way. The very ship that the captain had before that, the Beilside, went down that way off the banks of Newfoundland.

Q. What is the name of the stevedore of Gomila that loaded this ship?

A. Jake Nebb; he keeps a coffee-house; he is not a regular stevedore; he does the trimming for Mr. Gomila cheaper than I could.

Q. Does he do that kind of work cheaper than you do?

A. Yes, sir; he is called to do work that I would charge and get $2.50 a thousand for, and he would do it for ninety cents for

304 me; so that there is a difference of a dollar and a quarter; so that a man cannot pay expenses and live to do work so cheap; there is no money in it.

Q. How is that he does it if there is no money in it?

A. Well, the vessel's space is not filled up to the deck, with a little ways apart. There is a beam that stands up in the between decks in the ship's hold, and you have got to trim the cargo in between her beams and flanges to fill up the space tight, or the grain runs from one side to the other when the ship is listed.

By Mr. BECKWITH:

Q. That is, you mean to stow a ship properly involves a great loss of time and expense that is not involved by tumbling the grain in?

A. Certainly; it is to stow a ship properly that costs the whole expense, more than to stow it improperly. That is so with every kind of cargo.

Q. Why?

A. I explained it to you; because it takes time to trim the grain in between these flanges. Any sailor can tell you that it takes time to stow it in, because if you fill it in it will fill up level with the beam, when there is a space clear up to the deck with these flanges, where there is nothing at all for eight inches or a foot deep. That space not being filled, when the ship takes a list the grain will run over into that space the same as water from a bucket, and will throw the ship on her beam ends and the ship may founder. That
305 accounts for ships shifting their cargo.

By Mr. MCCONNELL:

Q. You say this man that attends to this business for Mr. Gomila charges ninety cents where you charge two dollars and a half?

A. Yes, sir.

Q. What is the difference between your charge and the charge made by other stevedores?

A. The same as other stevedores. These are sub-contractors that do it by cheap labor. There are two brothers that do this same thing upon Fourth street.

Q. What are their names?

A. I don't know their names. They trimmed grain on the Silvertown for me.

Q. Where do you reside?

A. 467 Fulton street, close to the Bethel, where there is an iron fence.

Q. How long have you resided there?

A. Four years.

Q. You say your business has been a stevedore for the last thirty years in this port?

A. Yes, sir—that is, off and on; sometimes I would leave and go away.

By Mr. BECKWITH:

Q. What would be the difference in a paying price of stowing a ship by tumbling the grain in loose, without regard to filling the spaces between the beams, and the proper stowage of a ship by filling up all the spaces and stowing it properly, giving your estimate at the thousand bushels?

Mr. Gurley objects on the ground that this is a hypothetical question.

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A. The difference of loading a ship properly and stowing it—I can turn to and stow a ship for ten cents for grain. It takes great pains to stow grain in the proper shape. I know when loading the Deronda I stowed it in the between decks, and it cost three times as much for stowing it in the between decks as Jake Neeb got for the whole ship. I think I had one hundred and eleven working on that ship moving bags, carrying them ashore, and carrying them on. I don't think Jake Neeb had one quarter of the men in stowing the whole ship.

Q. What would be a fair price in the port of New Orleans per thousand bushels for stowing the Deronda as she should have been stowed?

A. To stow the Deronda in proper shape and form it is worth three dollars and a half a thousand bushels.

Q. What would be a fair price per thousand bushels for stowing the Deronda as you found her stowed when you broke her out?

A. That I cannot say exactly, because I did not go down into the hold, but only to the between decks. I know the way it was thrown into the between decks; it was there in all shapes. I am not positive what this man gets from Mr. Gomila.

Q. But what could it be profitably done for?

A. If he got two cents and a half per sack for stowing it he was making money.

Q. How many bushels in a sack?

A. Three bushels in a sack, or two and three-quarters.

By Mr. MCCONNELL:

Q. How many days would it take to stow the Deronda with
307 a cargo of 82,588 bushels of grain—to do it properly, with a proper force?

A. To do it properly would take from two and a half to three days. I have stowed larger ships in eighteen hours in the same way. If I do not get a price for my work I will not do it; I will not loose money on it; I am going to slight the ship.

Cross-examined by Mr. GRANT:

Q. You have stowed ships improperly?

A. Yes, sir; because I did not get my price.

Q. Who stowed this ship that sunk—the Bellside?

A. I think Mr. Drysdale. She was loaded across the river here; and the Duro at the same time.

Q. He is a stevedore?

A. Yes, sir.

Q. He stands well in his business?

A. Yes, sir; one of the best in the city.

Q. You pretend to say that a stevedore will stow a vessel so that she is in danger at sea because he makes a bad bargain?

A. Yes, sir. I don't think there is a stevedore in New Orleans who, if his price is cut down, is going to stow the ship properly.

Q. So there is no proper method of stowing a ship?

A. No, sir; it depends upon the price.

Q. And the honesty of the stevedore?

A. Yes, sir. A man can blow a ship up so that she can carry nothing.

Q. Were you there when the coal bunker was emptied?

A. Yes, sir; we worked night work at that.

Q. That was emptied after the vessel — loaded?

A. Yes, sir.

Q. In order to make room for the cargo that could not get
308 in otherwise?

A. Well, she could take all the cargo if she was properly stowed, because that was proved by the inspectors when they came on board. She took fifteen hundred bushels more in the between decks. I did not do this work for nothing; I got well paid for it, but if the ship was stowed in all the hold as she was in the between decks I know she could have carried the cargo.

Q. Do you know how she was stowed in the lower hold?

A. No, sir; only from what the captain wrote to me afterwards. He had a gale at sea, and the ship shifted her cargo and was on her beam ends.

Q. Did not the captain know that she was properly stowed?

A. I think he was satisfied that she was loaded well; from what I know of these parties they did not want to see her broke out, because they knew I would put the quantity of grain in.

Q. You loaded up this coal bunker with grain?

A. No, sir; I did not go into the coal bunker.

Q. She was loaded up in the bunker?

A. No, sir; there was more grain put in the hatch; I forget how many bushels and bags.

Q. You cannot tell how many bushels and bags were put in there?

A. No, sir.

Q. Were you there when they took the water out of the tanks?

A. No, sir; I don't know that they took the water out of the tanks, only what I heard about it. I heard one of the inspectors talk about it next day, when the ship was lightened up.

By Mr. McConnell:

Q. When you said in your examination awhile ago that a ship by being improperly loaded could be blown up—explain what you mean by the term "blown up."

309 A. That is an easy matter. For instance, if I was stowing this room I would put twenty-five bales across in a tier of the room; then I would hook the cotton down without putting a screw to it.

Q. How do you explain that term as applied to grain?

A. It is just the same process; when I come on the top of that cotton and come to roll it up to the ship's deck I do not screw it, but fill it up loose, that way, and you can do the same thing with cotton as with grain.

Q. In doing it in that slack way you can do it with less expense and labor?

A. Yes, sir; I can do it with one-quarter as much—for seventy-five cents a bale of cotton.

Q. And the same proportion of grain?

A. Yes, sir; the very same.

Adjourned to Saturday, February 9, 1884, at 2 o'clock p. m.

United States District Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

Testimony taken on behalf of libellants before John Devonshire, United States commissioner, this 13th day of February, 1884.

Present: J. Ward Gurley, Jr., and William Grant, Esqrs., for libellants; James McConnell, Esqr., for the respondents.

310 JOHN EDELHEIM, sworn for the libellants, says:

By Mr. GURLEY:

Q. What is your business?

A. A grain exporter.

Q. How long have you been engaged in that business?

A. Twenty-three years.

Q. In this city?

A. No, sir; in this city only five years and two months.

Q. When a sale of a certain quantity of grain is made, say ten thousand quarters, on the other side, and the vessel by which it is to be shipped fails to hold ten thousand quarters, what is the result?

Mr. McConnell objects to this testimony and all testimony of a similar nature and the same purpose as made on the examination of the other witness on the ground of being *res inter alias acta*, hearsay, and irrelevant under the pleadings. The charter party being the sole evidence of the contract, its terms cannot be altered, varied, or enlarged by any evidence whatever, and being in writing its terms and conditions are fixed and must govern the rights of the parties to it; the same objection to apply to all similar testimony without being further reiterated.

A. The buyer on the other side will throw the cargo up and hold the vessel responsible for any damages arising from non-fulfillment of the contract.

Q. Have you known of such cases?

A. Yes, sir; I have.

Q. Is that the universal custom?

311 A. That is the universal custom.

By Mr. GRANT:

Q. Do you know whether most of the sales made in this market of grain shipments are usually made for a June shipment or a shipment during any particular month?

A. Except in a very few instances it is at a certain time; a month or half a month.

Q. The parties buying, then, on the other side, as a usual thing, require the grain to be loaded within a particular time?

A. Yes, sir; within a certain time.

Q. Is that well known here in this market?

A. Yes, sir; that is well known here and in every other market.

Q. Now, in transacting this export business is time an essential ingredient in all contracts for the successful transaction of that kind of business?

A. Yes, sir.

Q. When the grain is not loaded within the time specified by the contract of sale is it or is it not usual for the purchaser to reject the sale?

A. It is usual to reject the sale; of course, it all depends upon the market; if the market is going up and the sale was cheap they will not reject it, but it is in the buyer's hands to reject the sale or not.

Q. So when the market goes down they exercise the right of rejecting?

A. Yes, sir; they exercise the right of rejecting.

Q. Is that practice known among dealers in this city?

A. It is known among dealers in this city and to every grain exporter as well as to every ship-owner.

312 Q. And masters of vessels also know of this custom?

A. They are aware also of this custom, and *then* agents.

Q. Where were you in business before you came here?

A. I was in business in New York; previous to that on the other side—in Hamburg and in Hanover, Russia.

Q. Does this custom extend, then, all over the world?

A. Yes, sir; that custom extends all over the world.

Q. Quick dispatch is the custom also in exporting grain, is it not?

A. We had certain commercial expressions; for instance, we hardly ever sell "quick dispatch;" we sell "immediate shipment," "shipment within fourteen days," "prompt shipment," "shipment within this month or next month." "Immediate shipment" is ten days and "prompt shipment" is twenty-one days.

Q. But it is the invariable custom to fix the date?

A. Yes, sir.

JOHN VAN DORP, sworn for the libellants, says:

By Mr. GRANT:

Q. What is your business?

A. A grain exporter. I represent Orthmein Brothers, of St. Louis. I represent that firm here in this city and hold their power of attorney.

Q. In what business are they engaged?

A. Only in the grain business.

Q. Exporting grain?

A. Exporting grain.

Q. How long have you been engaged in that business?

A. I have been engaged for these people since the 22nd July last year; formerly I had the power of attorney of Engster & Co.

313 Q. How many years' experience have you had in the grain business?

A. I have had about nine years' experience in the grain business—nine years here and four years on the other side, in Rotterdam, Holland.

Q. Is it or not the practice and custom to sell grain for export to be delivered on board the ship within a particular time?

The same objections are made in the case of this witness as in the case of the last witness, Mr. Edelheim, and by agreement it is to extend to all that this witness may say.

A. It is always customary to stipulate the time of shipment.

Q. Is that custom well known to masters of ships, owners of ships, and grain dealers?

A. Masters know perfectly well, and persons making up the charter parties know it the same way.

Q. Now, where a sale of grain is made for shipment abroad, June delivery, what does that mean?

A. We never make a sale for June delivery; if you mean a June shipment in New Orleans, then it must be on board the last day of June, and the bills of lading must be dated on one of the days during the month of June.

Q. Is that well known?

A. It is well known; I can give you different instances of it if it is necessary.

Q. Is it or is it not the habit of buyers to reject the cargo when it is not put on board within the time specified?

A. Yes, sir; they avail themselves of every opportunity if
314 the market is against them, and if the contract has not been fulfilled as named they always claim damages.

Q. Is not this well known also to the trade and shippers?

A. To everybody in the grain trade.

Q. When the contract of purchase is for ten thousand quarters and the seller only delivered on board a less quantity is it or is it not the custom to reject the cargo for that reason?

A. Yes, sir; they generally do so.

Q. Especially if the market is falling?

A. They always try to get some advantage out of it. If they do not fulfill their contract the buyer has a perfect right to throw up the contract.

Q. Is that custom well known to parties engaged in the grain trade?

A. Everybody knows it in the grain trade.

Q. Do ship-owners and ship-masters know of it?

A. Perfectly well. I have thrown up a steamer last Monday for being three hours late—the steamer Jennie. The cancelling date called for the 10th of February and she was not ready to load on the 10th; she was only ready to load on Monday morning at half past ten, and for that reason I threw the contract up; and they do not even go to law about it, because they know they could not do a thing.

A. J. GOMILA, recalled for libellants, says:

By Mr. GURLEY:

Q. You have heard the testimony of Mr. De Wolf relative to the figuring done by you in the presence of the captain at the
315 time that the captain was telegraphing to the owners about the quantity he thought his vessel would hold. Please explain what you did figure out at that time and upon what you based your figures.

The same objections are made as made to the evidence of Mr. Edelheim and Mr. Van Dorp to the evidence of Mr. Gomila and will be held to be made without further repetition.

A. The captain knew himself so far as the weight of the cargo was concerned. Every vessel or every steamer when she is handed over by the builder to the owners is accompanied by a general plan of the ship, which gives the carrying capacity in dead weight and also the measurement spaces in cubic feet. Now, the captain knew how much dead weight the vessel would carry from this general plan, and he himself had no doubt that she could carry the cargo, which amounted to (2,150) twenty-one hundred and fifty tons. He asked my assistance in figuring out the cubic measurement of the quantity of corn which I required her to carry, as he did not know the measurement of corn. I made the calculation for him in this way: Ten thousand quarters of corn is 85,714 bushels, and a bushel of grain measures one cubic foot and 0.245, which would make a total of 106,714 cubic feet. To that I added ten per cent. for the spaces occupied by the proportion which was to be sacked, giving an additional quantity of 2,670 cubic feet, making a grand total of 109,384 cubic feet. His general plan stated his ship, as near as I can recollect, at 117,000. Now, this included the space occupied by
316 what is called a temporary bunker, which I can only explain by reference to this diagram which I have drawn myself.

Mr. Gurley offers the diagram in evidence, marked "Gomila Deronda."

WITNESS: This temporary bunker is shown on the diagram by the dotted line "A B." Now, that temporary bunker can be removed. It is legitimate cargo space, and it can be removed or used as space for coals. That was the explanation I made to the captain, that the cargo would occupy 109,384 cubic feet, and his cargo spaces in the ship amounted to 117,000 cubic feet, as near as I can recollect. Now, of course, the calculation in stowing a cargo of grain is that this grain will fill up all spaces just as water would, but that is only theoretically correct. Of course, in stowing the vessel the grain is not put in as compact as water would be; there is always a little loss, but with that margin of about (8,000) eight thousand cubic feet I told him I had no doubt that he could carry it. Now, it seems that in loading his vessel he did not take out from it that temporary bunker, but took his chances of the cargo fitting it and using that space for coal. In my opinion that is where the captain erred in loading his vessel.

Q. On this calculation of yours did you tell the captain or did you attempt to show him by figuring that he could carry the ten thousand quarters by using this space of this temporary bunker?

A. No, sir; I did not go into that at all; I simply told him the figures and allowed him to prepare his vessel himself.

317 By Mr. GRANT:

Q. Do you know whether this master had carried cargoes of grain before on that ship?

A. I don't think he had carried cargoes before, but she had carried cargoes before under another master, and she had carried more than ten thousand quarters, and which was a corroboration of my calculations. I arrived at my calculations from experience in loading other vessels.

Q. How much did you pay the stevedore per thousand bushels for putting in that cargo?

A. I paid him a dollar and a quarter for the trimming of the bulk per thousand; sacking and sewing sacks, ¾ of a cent, and for the stowing of the sacks 2½ cents, and for extra labor at night $21.

Q. State whether that is the usual compensation or not for such work.

A. Well, that is the usual compensation that we pay to these people. We employ them regularly in loading ships, but other stevedores, or the regular stevedores, as they are called, charge $1.75 per thousand. They have to employ what is known as trades-union men, who are under a combination, and our stevedore employs our own men on these barges, which we have all the time, and they get them much cheaper. They are able to do the work cheaper on that account. I mean our stevedores.

Q. Who done that work?

A. Alfred — Neeb.

Q. Is the distinction which you have shown between the regular stevedores and these men that you employed in this case, Al-
318 fred and Neeb, such as you have stated?

A. Yes, sir; these men, Alfred & Neeb, are specially grain stevedores. The other men, the regular stevedores, are men who stow cotton and whatever grain they get incidentally. They do not do much grain business.

Q. Have these men, Alfred & Neeb, ever done that work before?

A. Yes, sir; they do it all the time.

Q. For how many years have they been engaged in that business?

A. I have employed Mr. Neeb three or four years, and Mr. Alfred started just lately.

Q. How do they stand in this community?

A. Among those who know them they stand well. The regular stevedores charge $1.75 and Alfred & Neeb do it for a dollar and a quarter. I charged the Deronda $1.75. It is part of our profit in loading these ships.

Cross-examined by Mr. McConnell:

Q. The figures that you have stated there with regard to what you paid Alfred & Neeb you have taken from a paper which you had in your hand, dated New Orleans, June 30th, 1883?

A. Yes, sir.

Q. This is the bill which was furnished to you by them, is it not?

A. Yes, sir.

Q. And which you have brought here to-day to court?

A. Yes, sir.

Mr. McConnell offers in evidence the bill marked "Neeb."

319 Jacob Neeb, sworn for the libellants, says:

By Mr. Grant:

Q. What business are you engaged in?

A. In grain trimming and grain sacking.

Q. How long have you been engaged in that business?

A. For about fourteen years in that business.

Q. Have you any special branch of stevedoring?

A. Not any more than grain.

Q. Grain is your special business—stowing grain in ships?

A. Yes, sir.

Q. Who loaded the Deronda last June or July?

A. I loaded her; I done the work in June some time.

Q. Did you load her in the customary and usual manner of stowing and in the proper manner of stowing grain in ships?

A. Yes, sir; I took very particular pains with it, too.

Q. Under whose direction did you load her?

A. Under the captain's, the mate's, and the surveyor's.

Q. The surveyor was Capt. Baker?

A. I am not quite sure it was Captain Baker, but I think it was Captain Baker.

Q. You always load ships under the direction of the officers of the ship, do you not?

Mr. McConnell objects to this question and the preceding one as irrelevant and leading.

Mr. Grant withdraws the question.

Q. Under whose direction did you load the steamship Deronda?

320 A. In the first start, going on board the ship, we got our instructions from the surveyor. He tells me how to load her, but at the same time we are under the directions of the officers of the ship, because they are to see what we do.

Q. Does not the master or some proper officer of the ship superintend and direct the manner in which the ship should be loaded and trimmed?

Mr. McConnell objects to the question as leading.

A. Yes, sir.

Q. Who directed and superintended the loading of the Deronda?

A. Who gave me my instructions?

Q. Yes; the directions for loading and trimming the cargo.

A. The captain and mate both, with the surveyor. The surveyor stopped me from loading her when she went down so deep into the water. The captain and mate gave me instructions afterwards when the surveyor left.

Q. Why did you suspend the operation of loading the Deronda at the time you did?

A. The surveyor stopped us, saying that she was deep enough.

Q. Who was present then? State whether or not the master was present at the time.

A. The mate was present at the time.

Q. Was there any space left at the time the inspector stopped you loading?

A. Yes, sir; there was space left forward in No. 1 hatch, away forward.

Q. Why did you not fill that up?

321 A. She was going down by the head—she would have been down by the head if we had to put more grain in her.

Q. That was the reason you did not put any more cargo on board forward?

A. No, sir; we could not put any more forward and there was no more room suitable on the ship to put the cargo in at the time.

Q. You could not put it there because she was too far down by the head?

A. Yes, sir; she was about an even keel then when we stopped.

Q. Look at this plan, marked "Gomila Deronda," and state whether the space enclosed within these dotted lines "A B" represents a temporary bunker on the ship.

A. Yes, sir.

Q. Now, is or is not that a bunker which can be removed for the purpose of receiving cargo?

A. Yes, sir; that is only a temporary partition or load bulkhead in there.

Q. Was that full or empty at the time you loaded her?

A. The lower hold bunker was full and the between-deck bunker was partly full of coal; it was quite full.

Q. That could not receive cargo?

A. No, sir; you could not put cargo in there.

Q. Have you had much experience in loading ships with grain?

A. Yes, sir; I have.

Q. How many years?

A. I have been loading ships with grain for the different stevedores—for almost every stevedore on the levee.

Q. You have loaded for nearly all the stevedores on the levee?

322 A. Yes, sir.

Q. What is the usual price you receive for loading and trimming cargo per thousand bushels?

A. A dollar and a quarter a thousand for bulk or a dollar and a half, and for storing 2½ and 2⅓ cents per sack. The filling of the sacks is paid by the bushel.

Q. Were you paid the usual price for loading the Deronda?

A. Yes, sir.

Q. Now, can a man do honest work at that price?

A. Yes, sir.

Q. Do you employ trades-union men on board in loading a ship?

A. Yes, sir; we have some union men. They are what they call the Grain Trimmers' Union, both white and black. I don't know whether they belong to the Trades Assembly or not. We have some who are not union men.

Cross-examined by Mr. McConnell:

Q. You were employed by Gomila & Co. to load this cargo on this ship—you and your partner, Alfred?

A. Yes, sir; we took the ship for so much.

Q. You were paid by them?

A. Yes, sir; paid by them.

Q. The sum of $352.09?

A. I cannot say exactly, but about that.

Q. That was for services rendered down to the 30th of June, inclusive. Was not some grain put in that ship later than the 30th of June, say in July?

A. Yes, sir; some a week after.

Q. Did you put that grain in?

—. ——.

323 Q. That is, your firm did, Alfred & Neeb?

A. Yes, sir.

Q. Do you remember how many more bushels you put in in July?

A. I cannot exactly tell.

Q. Do you remember about what quantity you put in?

A. Six or seven thousand sacks.

Q. Do you remember when you were putting it in, in July, that subsequent quantity, six or seven thousand sacks or whatever it may be? I think you are mistaken as to the quantity, but what I want to know is who told you that there was enough put in when you stopped finally putting it in in the month of July, the last putting in. Who was it told you that the ship had her quantity in and told you to stop putting in any more, if anybody told you? Or state why you stopped.

A. I don't recollect who stopped us then, because I was down in the hold stowing it away.

Q. Somebody stopped you?

A. I don't know whether it was the surveyor or the mate; they were both together, going up and down the ship looking at the marks.

Q. I am speaking of the last loading, in July.

A. Yes, sir.

Q. Somebody told you to stop?

A. Yes, sir; the surveyor was there when we loaded her.

Q. At the time you were told to stop—whether by the surveyor or the mate you don't know—where were you putting the grain in at that time?

A. In the between-deck bunker.

Q. Was there not room still for you to have put in more
324 grain than what was put on in the same place where you were putting it in?

A. Yes, sir.

Q. What sized space was vacant or open where you could have put in more grain in that bunker when you were told to stop?

A. I suppose two hundred or two hundred and fifty sacks more than was in it.

Q. How many of these sacks does it take to make a bushel, or what quantity does a sack hold?

A. It is about two and three-quarters bushels to the sack.

Q. Then that is the sack you have reference to when you say the ship would hold two hundred and fifty more sacks?

A. Yes, sir.

Q. Now, to go back a piece to the time when you loaded this vessel, in the latter part of June, was not the loading the vessel stopped during a part of the time by rain?

A. Yes, sir; there were showers occasionally, and we stopped awhile until they were over.

Q. During the time that it rained you could not put in grain?

A. No, sir.

Q. That would damage the grain?

A. Yes, sir.

Q. How much of the time was the loading of the ship stopped by the rain?

A. I cannot say that.

Q. It was stopped a part of the time—occasionally?

A. Yes, sir; it was stopped a part of the time from the rain.

Q. Now, if that rain had continued you would have stopped
325 until the rain stopped?

A. Yes, sir.

Q. Necessarily so?

A. Yes, sir; we would have to stop.

Q. Waiting until the rain was over?

A. Yes, sir.

Q. Now, whenever a ship is to be loaded with grain there is a grain inspector on board of that ship?

A. Yes, sir; a grain inspector is on board.

Q. He is put there for the purpose of seeing that the vessel is in a condition to receive the grain, and he gives a certificate to that effect?

A. Yes, sir; the surveyor does.

Q. You call him a surveyor?

A. Yes, sir.

Q. Does he not direct the loading of the ship with grain; does not he superintend it?

A. He does not stay there; he only gives instructions what to do, how to load the ship, in what manner, not to put too much at the head or at the stern, and also what free board he wants.

Q. He tells the manner in which she is to be loaded?

A. Yes, sir.

Q. And you follow his directions?

A. Yes, sir.

Q. You load the ship, then, according to his directions?

A. Yes, sir.

Q. That is, the directions of the surveyor?

A. Yes, sir; and the mate follows me up and down and
326 gives instructions down there what to do to suit him.

Q. Do I understand you that the mate should set aside the directions of the surveyor as to the way it should be loaded?

A. Well, when he goes away he tells me to load this ship according to the way he says, not to put too much at the head or too much at the stern, and the mate has to watch me that I do it.

Q. You get your directions from the surveyor, as you state, and the mate?

A. Yes, sir.

Q. Now, suppose when the surveyor steps off ashore and the mate gives you a contrary direction, whose orders do you obey—the surveyor's or the mate's?

A. The surveyor's.

Q. Who paid you for your services in loading this ship in July?

A. It was all, I believe, in one bill.

Witness being shown the bill marked "Neeb" for $352.09.

Q. You have seen that bill before?

A. Yes, sir.

Q. It is dated New Orleans, June 30th. That is not for work done in July, is it?

A. Well, I don't recollect what time the bill was made out. Mr. Alfred collected the bill; I did not collect it.

Q. Who collected it?

A. Mr. Alfred.

Q. Does that bill include the payment for the services rendered by you in July as well as in June?

A. I cannot say; I did not make out the bill at all.

Q. Mr. Alfred made out the bill?

327 A. Yes, sir.

Q. Have you and Mr. Alfred or either of you any occupation besides that you have described—trimming vessels?

A. I have none; only that work.

Q. What is Mr. Alfred's occupation?

A. He is weigher on the elevator.

Q. Are either of you engaged in any other business besides this?

A. I have a bar-room uptown, at the corner of Ninth and Tchoupitoulas streets.

Q. Who keeps that bar-room for you? Are you alone?

A. I keep it myself.

Q. Corner of Ninth and Tchoupitoulas streets?

A. Yes, sir.

Q. How long have you kept that bar?

A. Nine years now, going ten. I have been in that business twenty years—keeping a grocery and bar-room.

L. P. ALFRED, recalled for libellants, says:

By Mr. GURLEY:

Q. Look at that bill, marked "Neeb." Is that the bill which you and your partner rendered to Gomila & Co. for loading the steamship Deronda last June?

A. Yes, sir.

Q. Does that include the work that you did in loading in July?

A. No, sir; I was employed by the captain of the vessel in July.

Q. Who paid you for your work in July?

A. The agents, De Wolf & Hammond.

Q. Did they pay you for all the stevedore work that you

328 and your partner did on the Deronda for the month of July?

A. Yes, sir; all additional work after this bill.

Q. You and your partner were employed to do that work by the master of the vessel?

A. Yes, sir; the captain. I asked him for written instructions to do so, and he would not give them; he told me to do the work and he would see it was paid for.

Q. It was paid, then, by De Wolf & Hammond?

A. Yes, sir; I do all the writing of my firm, Alfred & Neeb—making out the bills, etc.

Cross-examined by Mr. McConnell:

Q. Where do Alfred & Neeb keep their office—where — they do their writing?

A. Well, I have been doing it on board the elevator. I testified before that I was employed by Gomila & Co. as superintendent, and during the active part of the season I am weighmaster on one of the elevators; I have an office on board.

Q. Is that the only office that the firm of Alfred and Neeb have?

A. Yes, sir.

Q. Do you keep their books there?

A. I did up to last November; I have only been in the firm since then.

Q. Who owns the elevator?

A. Gomila & Co.

Q. Do you call yourself a practical stevedore; do you attend to *do* the actual work of stowing goods on a vessel?

A. No, sir; I do at times; but as a general thing my partner attends to that, and I run the elevator.

329 *New Orleans Grain Charter Party.*

De Wolf & Hammond, No. 25 Carondelet street, New Orleans, steamship and ship brokers; cable address, De Wolf, New Orleans; codes used, Watkins', Scott's, and our own.

New Orleans, 19*th June*, 1883.

It is this day mutually agreed between De Wolf & Hammond, as agents of the steamship Deronda, of 1,090 tons net register or thereabouts, now in New Orleans, and —— ——, of New Orleans, merchants, that the said steamer shall, with all convenient speed, proceed to New Orleans, or so near thereto as she may safely get, and there, being in hull, boilers, and machinery tight, staunch and strong, classed 100 A 1, and every way fitted for the voyage, shall load as customary at such safe loading berth, always afloat, as ordered by charterers on arrival (and if afterwards required by them to shift, they to pay the ordinary expense of towing), a full and complete cargo of wheat $\frac{\text{and}}{\text{or}}$ maize $\frac{\text{and}}{\text{or}}$ rye in bulk $\frac{\text{and}}{\text{or}}$ ship's sacks, as customary; which is to be brought to and taken from alongside, as customary, at merchants' risk and expense, at ports of loading and discharge (all lighterage required to be paid for by cargo) and at charterers' risk, not exceeding what she can reasonably carry over and above her tackle, apparel, fuel, provisions, and furniture, and, being so loaded, shall therewith proceed under steam to a safe port, always afloat, in the United Kingdom or on the Continent, between Bordeaux and Hamburg, both inclusive, excluding Rouen, calling at Queenstown or Falmouth for orders, which are to be given within twelve hours of arrival or lay days to count, or so near thereunto as

she may safely get, one port only to be used, and deliver the same on being paid freight, all in British sterling, as follows:

Five shillings and three pence sterling per quarter of 480 pounds weight, delivered in full, if calling at Queenstown or Falmouth or ordered direct to Continent. If ordered to Continent from port of call, ten per cent. additional. If ordered to United Kingdom direct, three pence off—

Charterers having option of Elsinore for orders to discharge at Copenhagen or Aarhuns at five shillings & nine pence per quarter of 480 lbs. Steamer is guaranteed to carry not less than ten thousand quarters of 480 lbs.

In full of all port charges, pilotages, and other charges usually paid by steamers (the act of God, the public enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, boilers, machinery, and steam navigation of whatever nature and kind soever during the said voyage always mutually excepted).

1. Steamer to be ceiled and dunnaged at owners' expense.

2. The carpenter employed for ceiling to be approved by charterers.

3. Elevating charges for bulk grain to be paid by charterers.

4. Stevedore for loading said steamer to be appointed by charterers, under captain's directions, at current rates for such labor. Charterers are not to be held responsible for improper stowage.

5. Steamer to have liberty to call at any ports for coal or other supplies.

6. Steamer to have liberty to tow and assist vessels in all situations, and to proceed with or without pilots.

7. The freight to be paid on unloading and right delivery of the cargo in cash, without discount, if in the United Kingdom; if on the Continent, in cash at current rate of exchange for bankers, eight days' sight bills on London.

8. Sufficient cash for steamer's ordinary disbursements at loading port to be advanced by De Wolf & Hammond, at the current rate of exchange, vessel paying 2½ per cent. commission and cost of insurance thereon; the captain to draw at 30 days' sight upon charterers' agent at port of discharge or on his owners, payable in London, or five days after arrival, at charterers' option, against the amount of freight due under this charter, and the amount of the draft to be deducted from the freight on settlement, if not previously paid.

9. Bills of lading to be signed as and when presented, without prejudice to this charter. Any difference in the amount of freight between the bills of lading and this charter party shall be settled at port of loading before the steamer sails. If in her favor, to be paid in cash at current rate of exchange, less insurance; if in charterers' favor, by captain's draft, payable three days after arrival of steamer at port of discharge, or at 30 days' sight on charterers' agent at port of discharge, or on his owners (payable in London) at charterers' option.

10. Should the steamer be ordered to discharge at a port where

there is not sufficient water for her to enter the first tide after arrival and to lie always afloat, lay days are to count from 24 hours after arrival at the port, and any lighterage incurred to reach the port of discharge is to be at the expense and risk of the receivers of the cargo, any custom of the port to the contrary notwithstanding.

11. Should the steamer be ordered to a port of discharge on the Continent inaccessible by reason of ice on the steamer's arrival, the master to have the option of waiting until the port is again open or of proceeding to the nearest safe open port or roadstead (telegraphing his arrival there to freighters), where he shall receive fresh orders for an open and accessible port of discharge in the United Kingdom or Continent, as above, within 24 hours of arrival or lay days to count. If so ordered the steamer shall receive the same freight as if she had discharged at the port to which she was originally ordered; but if ordered to a port more than 100 nautical miles distant from such open port or roadstead, the freight shall be increased by three pence per quarter. In no case shall the steamer be ordered from a port of call in the United Kingdom to an ice-bound port.

12. Should dunnage or ballast be required the same to be furnished by owners.

13. Sixteen days, Sundays excepted, are to be allowed the said merchants (if the steamer is not sooner dispatched) for loading and discharging and ten days on demurrage, over and above the said lay days, at six pence sterling per gross register ton per day.

14. Should the steamer not be ready to load at New Orleans on or before the — ——, charterers or their agents have the option of cancelling this charter.

15. Lay days to commence the day after the steamer is declared ready to receive cargo and having been passed by the surveyor of grain vessels and written notice given by the master to the charterers or their agents.

16. Loading days to be endorsed on captain's copy of charter party; the charterers' liability on this charter to cease when the cargo is shipped, provided the same be worth freight, dead freight, and demurrage at port of discharge; the master and owners have an absolute lien on the cargo for all freight, dead freight, and demurrage.

17. Steamer to be consigned to De Wolf & Hammond, at New Orleans, paying them an address commission of 2½ per cent. on the amount due under this charter party.

18. A commission of 5 per cent. on all freight, dead freight, and demurrage is due on execution of this charter party (vessel lost or not lost), to ——.

19. Penalty for non-performance of this agreement, estimated amount of freight.

(Signed) DE WOLF & HAMMOND,
By Cable Authority.

(Signed) E. FORRESTIER & CO.

Witness to the signatures of both parties:
C. G. DEFFARGE.

Certified to be a true copy of the original charter party in our possession. —— ——.

This document is marked A 4.

330 *Hearing & Submission.*

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

MARCH 21, 1884.

This cause came on for trial, J. W. Gurley, Jr., & Rouse & Grant, for libellants; J. McConnell & J. R. Beckwith, for respondents, and, after hearing the pleadings, evidence, and argument, the court took time to consider, one week being allowed libellants to submit brief and one week to respondents for reply, the evidence offered by the parties being as follows:

For libellants.

1. Exhibit annexed to libel.
2. Writ of attachment, return thereon, and release bond.
3. Depositions of G. H. Eldridge, David Robson, B. T. Bangston, Wm. H. De Wolf, A. J. Gomila, A. K. Miller, F. M. Hall, D. E. Morphy, Wm. P. Ross, Wm. M. Baker, Larned Torrey, F. Lazurtequi, Leon Labat, Luther Alfred, Francis Rickert, John Edelheim, John Van Dorp, and Jacob Neeb.
4. Exhibit Bangston No. 1 to Bangston No. 32, both inclusive; Gomila No. 1 to Gomila No. 9, both inclusive; A No. 1 to A No. 3, both inclusive; A No. 17 to A No. 18, A No. 22, A No. 23, A No. 25, A No. 27, A No. 29, A. No. 30, A No. 31.

For respondents.

1. Testimony of John Beattie.
2. Certificate of W. M. Baker, surveyor, dated 29 June, '83, marked C No. 3.

331 3. Letter of E. Forestier, dated July 5, 1883, marked C No. 2.

4. Letter of E. Forestier & Co., same date.
5. Letter of De Wolf & Hammond to Gomila & Co. and Forestier & Co., charterers, marked C No. 4.
6. Letter of De Wolf & Hammond to Gomila & Co., of July 12, 1883, marked C No. 1.
7. Charter to Gomila & Co., 19 June, '83, and cancellation endorsed thereon, marked A 3.
8. Charter, June 19, 1883, to E. Forestier & Co., marked A 4.
9. Certificate of registry, marked B No. 5.
10. Certificate of Conway, W. M. Baker, inspectors, dated July 13, 1883, marked B No. 1.
11. Protest of July 6, 1883, of Gomila & Co., by De Wolf & Hammond.

12. Protest of July 6, 1883, by same, of E. Forestier & Co., marked B No. 3.

13. Protest of July 7, 1883, by capt. & agents S. S. Deronda, of Gomila & Co., & E. Forestier & Co., marked B No. 4.

14. The admission in behalf of De Wolf, noted in record.

15. Testimony of Wm. H. De Wolf & doc'ts therewith, filed & noted in record as offered by defendants.

The above is offered subject to the objections noted in the record.

Opinion. Filed June 2, 1884.

District Court of the United S's, Eastern District of Louisiana.

332 GOMILA & Co. *vs.* CULLIFORD & CLARK. } No. 11965.

Before Edward C. Billings, judge.

This is an action for damages for the breach of a charter party brought by the charterers against the owners.

On the 19th June, 1883, Gomila & Co., the libellants, chartered the steamer Deronda. The charterers were to load the vessel. She was guaranteed to carry not less than ten thousand quarters of corn of 480 lbs.

The loading was commenced on June 28th. On June 30th the vessel was declared by the inspector to be full. She then contained 9,635 quarters—*i. e.*, 365 quarters less than the guaranteed quantity.

Upon the communication of this fact to the libellants and by them to the parties with whom they had a contract, to fill which the charter of the Deronda was entered into, they refused to accept of the delivery of the amount of 9,635 quarters, their contract being not less than 10,000 quarters and not more than 12,000 quarters. A settlement was made with their purchasers by libellants by the payment of some $3,100.

Negotiations were entered into between libellants and respondents, first, to have the respondents take the cargo at the price at which the libellants had contracted to sell, and afterwards to adjust the damages by fixing the value of grain laden by what could be obtained by offers at private sale from other European parties, and no agreement as to the damages.

333 Corn had declined, and, after advertising the sale in the two leading morning New Orleans newspapers, in one five days and in the other for three days, and in one of the evening newspapers for three days, the cargo was, on July 7th, sold at public auction by an auctioneer at a price which would be — per quarter.

On the 6th of July De Wolf & Hammond, as agents of the owners of the Deronda, protested against the sale at auction as advertised, both to the libellants and their purchasers, E. Forestier & Co., through a notary public and with the two witnesses required by the statute of the State of Louisiana.

On the following day, July 7th, through the same formality, the captain of the Deronda and De Wolf & Hammond, agents in behalf of the owners, gave a notice both to the libellants as charterers and E. Forestier & Co. as transferees that the said vessel would on that day, at 10 o'clock a. m., be ready to receive the balance of the said cargo as per charter party.

On July 13th, the sale at auction having taken place and the remainder of the cargo having been furnished by the purchasers at the auction sale, the Deronda received the remaining 367 quarters, making the quantity guaranteed, namely 10,000 quarters, her coal bunks having meanwhile been taken out and other space having been furnished by the representatives of the vessel, and with this cargo she sailed to the port of delivery mentioned in the charter party, where she delivered the same.

There are two matters which relate (1) to the manner in which the action is brought and (2) to the effect of what was done as to transferring the charter party to E. Forestier & Co., which have been set up fully in the answer of respondents and have been
334 strongly urged in the arguments by their proctors, and which I will now consider.

1st. It is urged that the real and sole owner of the Deronda was Mr. Culliford, one of the defendants' firm, and not Culliford & Clark, against whom jointly this suit is brought.

It is not necessary to consider what effect would be given to such a defence presented in an answer when it appears that the suit was commenced and jurisdiction acquired by a seizure of the Deronda under a warrant of arrest containing the attachment clause according to admiralty rule No. 2, and that the attachment was dissolved by the defendants appearing in the cause and giving their joint bond or stipulation and filing their joint answer upon the merits, pleading performance of an alleged contract.

If this defence could be allowed to avail at all it would be only to cause judgment to go against the defendant Culliford alone.

But upon the merits I think the court must find against both defendants upon the ground that they held themselves out as owners for the purpose of making this charter party, and as owners subsequently ratified the charter made by De Wolf & Hammond as agents of the owners. See telegram A 17 from Culliford to his firm, dated June 18, 1883, and letter from Culliford & Clark to Hammond, June 19, and letters from defendants to plaintiffs, dated June 23, and marked A No. 20 & A No. 21.

It does not appear how the vessel was connected with defendants' business, but the whole evidence with reference to the transaction shows that the charter party was executed by De Wolf & Hammond as agents for and for the benefit of and under the direction
335 of defendants' firm as owners.

As in case of a question as to liability as a partner the holding out may create the liability independently of the fact of ownership. It operates as an estoppel. The holding out of themselves as owners by Culliford & Clark is abundantly established.

2d. As to the transfer there is no conflict in the testimony. The charter party was executed to the libellants, who were willing to substitute E. Forestier & Co. in case the guarantee was complied with, but who objected to any such substitution before it was ascertained whether the guarantee would be fulfilled. De Wolf and the representative of Forestier & Co. made the cancellation.

It is agreed by all that Gomila never assented to it. It was possible in law and necessary for Gomila & Co. to retain their contract rights as charterers with the defendants of the Deronda, and while they also designated her as the vessel which should receive the 10,000 quarters of grain from E. Forestier & Co. under the contract of June 7th (marked Bangston No. 1) the market had fallen, and they must place themselves in such a position that they could fulfill the contract with Forestier and still hold the defendants to their guaranty.

Had this obligation of guaranty been transferred to Forestier & Co. upon the default under it, Gomila & Co. might have lost the sale of the 10,000 quarters of grain at 28*s*. 3 pence.

The motive for Gomila & Co. not consenting to cancel is manifest, and the testimony of both Gomila and Bangston, of Forestier, is consistent, that they did not consent.

Indeed, the protests made by the defendants through their captain and agents, two upon July 6th and one upon July 7th, marked B, Nos. 2, 3, & 4, are inconsistent with the idea that the original charter party had been cancelled and this substituted in its stead. Gomila & Co. are in these documents treated as retaining their rights under the charter party, with a designation of Forestier & Co. as parties who under them were to accept fulfillment of the contract of purchase with them by means of it.

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There is but one charter party referred to, and the firm of E. Forestier & Co. are spoken of as transferees. So, too, the negotiation and correspondence and telegrams as to an adjustment of the loss, after the vessel was thought to be fully loaded, recognized Gomila & Co., the charterers, as being the persons who still held all the rights under the guaranty.

Indeed, all the evidence confirms Gomila & Bangston, and the so-called cancellation was effected without the assent and with the expressed dissent of Gomila & Co., and therefore their rights under the charter party and guaranty have not been annulled but remain in full force.

Upon the merits, the first question to be considered is, Was there a breach of the undertakings of the owners whereby they guaranteed that the Deronda would carry 10,000 quarters of grain?

It has been urged with great force that since the representatives of the owners of the Deronda knew that the charter party was entered into by Gomila & Co., the libellants, in order to carry out their contract to furnish a shipment in the month of June, that this fact should control or influence the interpretation of the charter party as to the time of performance.

On the other hand, the respondents, with equal earnestness, urge

that when a contract is silent as to the time of performance
337 the only qualification or limitation which the law will impose or supply is that the time of performance shall be reasonable.

It is possible that these two propositions might, as applied to this case, be harmonious, for, in determining what was reasonable, regard must be had not alone to the subject-matter of the contract but the intrinsic circumstances, and among these would be the known object of the contract, and I think that the inquiry as to the exact carrying capacity of the Deronda, the insertion into the contract of the guaranty on that subject, and the negotiations as to the time of the commencement of the loading and the manner in which it was to be done conclusively establish that the charter party was owned by the charterers and recognized by the agents of the owners as being the means of fulfilling a June contract.

In order to reach a decision of the case it is not necessary to consider the question of interpretation as a separate inquiry, but rather to apply these facts to the matter of attempted performance and admitted inability to perform.

There can be no doubt but that if it appears that, after an attempt to load the Deronda with the 10,000 quarters of grain in accordance with the guaranty, the owners admitted without reservation their inability to place in her no more than 9,635 quarters, notified Gomila & Co. of that fact; that in consequence of such unreserved admission and notification Gomila & Co. were induced to abandon their sale to E. Forestier & Co., thereby retaining on their hands the grain with the market price so conditioned that a heavy loss ensued, it would not be possible for the owners afterwards to revive the charter party except upon the condition of being responsible for such loss.

338 This is just what the evidence shows. And the principle of law which is to be controlled is not one exclusively of interpretation, but that when a contract is silent performance is tendered without reservation, which is admitted to be defective and the obligee acts irreparably upon such admitted non-performance, the contract is violated and damages result.

This is well settled as the law of Louisiana.

The reason given by the court in numerous cases, that a putting in default would have been a vain thing.

In Cable *vs.* Leeds, 6 Ann., 293, the court held that when a mechanic undertakes to make and deliver a piece of machinery as soon as possible and actually does deliver the machinery, but so defective that it will not answer the purpose intended, he puts himself into an irretrievable default, which superseded the necessity of being put in default by the other party.

The same question is dealt with in Knight *vs.* Heinnes, Robinson, p. 277, where the court says, p. 279, the defendant's acknowledged inability to comply with his contract rendered it unnecessary for the plaintiff to put him regularly in default. See also Nicholson *vs.* Dudley, 14 Ann., 81.

As to whether in point of fact there was this acknowledged inability to load the stipulated amount of grain, I should derive the

evidence from the correspondence and telegrams which passed between the defendants and their agents.

On the 30th June the agents of the defendants telegraphed to the defendants as follows:

JUNE 30TH.

To Culliford & Clark, Sunderland:

339 Deronda loaded; carries 9,635 quarters. Cargo sold not less than 10,000 quarters, Copenhagen 28, 3 pence; present value, 25; buyers refuse acceptance, as cargo falls short; charterers hold ship responsible. Advise.

(Sig.) DE WOLF & HAMMOND.

Under date of July 5, the defendants have answered by telegram; also replied by letter, as follows:

SUNDERLAND, 5 *July*, 1883.

Messrs. De Wolf & Hammond, New Orleans.

DEAR SIRS: We received your cable on Sunday, informing us that the Deronda had loaded 9,635 quarters and the cargo sold not less than 10,000 quarters at 28*s.* 3*d.*; present value, 25*s.*; buyers refuse acceptance, as cargo falls short; charterers hold ship responsible.

In reply to this we cabled you at once for you to compromise the claim and pay the difference of 3*s.* 3*d.* per quarter, as between the quantity stated to be shipped and the 10,000 quarters. We were astonished on Tuesday to find on receipt of your cable, "Charterers trying to sell cargo," that you had evidently misconstrued the purport of our message, but how this could be done by any sane person into meaning that we were willing to pay the difference of 3*s.* 3*d.* per quarter upon the whole cargo we are at a loss to understand, and can only come to the conclusion that such a meaning of our cable has been construed purposely. How a business man, supposed to be acting on behalf of an owner, could think that when a difficulty like the present arose he (the owner) should right off agree to give up more than half his total freight on such a voyage is too much for any stretch of imagination; and if our in-

340 terests can only be protected in the way you have managed this business the less we place in your hands the better. In the beginning of the negotiations for the charter of the ship there was a considerable mull, at which we expressed ourselves pretty strongly to your Mr. Hammond when in Liverpool, and when you offered us this freight we accepted it subject to the captain being satisfied he could carry the requisite quantity, and your cable of the 19th ult'o distinctly told us he could carry about 10,000 quarters, from which we concluded you had consulted with the captain; in fact, his letter informs us you had seen him with our cable, but we must call your attention to the fact that in the same cable you informed us about 10,000 quarters, and how you should insert in the charter not less than 10,000 quarters we are at a loss to comprehend.

Whilst writing your reply has come that you were consulting McConnell and trying to arrange, but no mention about the ship's

sailing. We therefore cabled you why the delay; to give bail and get the ship away.

We are at a loss to understand why the ship should be detained during these negotiations; the whole business is sickening. If you had understood your business at all you would have dispatched and settled the question after she had left, but how you have allowed the charterers to detain the ship in the way he has done we have yet to learn, but we certainly can come to no other conclusion than that you have grossly neglected our interests.

Yours truly, CULLIFORD & CLARK.

341 Under date of August 13 the defendants give a resume of the events attending the tender of the vessel as follows:

A No. 25.

SUNDERLAND, 13 *Aug.*, 1883.

Messrs. De Wolf & Hammond, New Orleans.

DEAR SIRS: Your letters re. of this wretched business have all been received and well noted, but we regret to say that they do not much alter our opinion of the manner in which this case has been handled by you.

The captain's protest, altho' probably correct, is about as weak a document as we ever read, unless your object was to disclose our hand and so strengthen that of the parties taking the action against the ship.

Will you tell us why you and the captain rushed away to Gomila as soon as it was found that the ship had not taken the guaranteed quantity? What other position could you possibly expect him to take than holding the ship responsible for a breach of the charter? Both you and the captain knew the ship was guaranteed to carry 10,000 quarters, and also knew there was no guarantee as to the time of shipment. With these two facts will you tell us why the ship was allowed to be so hurriedly loaded and why it did not dawn upon you at once to take the bunkers out (which should never have been put in)? In running away to Gomila you really played into his hands. If your captain was not competent for such a matter as this we would have thought ordinary common sense would have told you that care must be taken to get the guaranteed quan-

342 tity into the ship and to do this. How did you proceed actually with the doubt in your minds about the ship carrying the quantity? You allowed her to coal for Sydney. Ordinary caution for our interests should have prevented this and told you the ship must coal at Newport News.

This correspondence, coming from the defendants themselves, shows that it was admitted that the vessel could only carry 9,635 quarters. When that amount had been placed on board, and that as having that in her capacity, she was, without reservation, tendered to the plaintiffs under the charter party.

These facts bring the case within the principle of the cases above cited and establish a violation of the guaranty of the defendants that the Deronda would carry 10,000 quarters of grain.

The remaining question is as to the amount of reasonable damages which have been shown.

The amount of damages would be the difference between the contract price and the market price June 30th, the date of the defendants' admission of their inability to perform the contract whereby the plaintiffs lost their opportunity of selling to E. Forestier & Co.

The corn was laden on board and the quantity was so great that it would be difficult to find a purchaser, except in connection with the charter party. Of course, the auction price is evidence of value. Where the thing could naturally be bought and sold at auction the price is high evidence of value.

Considering the peculiar situation of this property, 10,000 quarters of grain laden on board a vessel, and the increased price which it was reasonably possible the grain would bring if sold in
343 connection with the charter party, I think as *gestor negotiorum* the libellant was justified in incurring the expense of an advertisement and attempted sale at auction, though I think he was not justified in permitting a sale at lower terms than, the evidence shows, were the ruling terms.

The difference between the contract price and the market price appears clearly in the telegram of De Wolf & Hammond to the defendants, dated June 30th, and is translated and fully assented to in the reply of letter of defendants, under date of July 5th. They say the price of cargo — 28*s.* 3*d*, present value 25*s.*, making a difference of 3*s.* 3*d.* per quarter. To this must be added 3*d.* per quarter, the difference between the allowed freight (which, if diminished, was to be for account of seller) in the contract of sale with Forestier and the rate fixed by the charter party, 6*s.* and 5*s.* 9*d*, in all 3*s.* 6*d.*, which would make the loss $8,426.25. To this should be added the charges which were paid the auctioneer for advertisement and fees, $934.72, making a total of $9,360.97, for which amount, with interest from June 30th, 1883, libellants must have judgment.

Judgement. Entered June 2, 1884.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } 11965.

This cause came on to be heard at the last term of the court and was argued by the proctors.

344 And thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the libellants, Gomila & Co., do recover from the respondents, Culliford & Clark, a firm composed of J. H. W. Culliford and John S. Clark, the sum of eight thousand four hundred and twenty-six $\frac{25}{100}$ dollars, and the further sum of nine hundred and thirty-four $\frac{72}{100}$ dollars, auctioneer's charges, mak-

ing altogether the sum of nine thousand three hundred and sixty dollars ninety-seven cents ($9,360.97) damages, with five per cent. interest from 30th June, 1883, till paid, and costs of suit.

And whereas the steamship Deronda, the property of the respondents, had been seized under the writ of attachment issued in the cause, but said seizure was released and the vessel restored to the owners on giving bond and security according to law:

It is further adjudged and decreed that J. H. W. Culliford and Jno. S. Clark, copartners under the firm name of Culliford & Clark, owners of said steamship, as principals on the release bond (by G. H. Eldridge, master, and their lawful bailee), and Thomas D. Miller and Emile L. Carriere, of New Orleans, as sureties on said release bond, be condemned *in solido* to pay the foregoing judgment, interest and costs.

Judgment entered June 2, 1884.

Judgment signed June 12, 1884.

EDWARD C. BILLINGS, *Judge.*

Motion for a New Trial. Filed June 5, 1884.

A. J. GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

345 On motion of Jas. McConnell, H. E. Upton, & J. R. Beckwith, proctors for respondents, it is ordered that the libellants show cause on —— why the decree herein shall not be set aside and a new trial and a rehearing in this cause shall not be granted for the following reasons, among others:

1st.

That the finding and decree made is contrary to the facts and law applicable to the case.

2nd.

Because the evidence disclosed and shows full performance of the charter party as executed.

3rd.

That the delay, if any, in the loading of the vessel is not attributable to the master and owners of the Deronda.

4th.

That the court erred in finding that the libellants was the charterer of the vessel on the last day of June, 1883; that the fact is that the libellants had, on that date, and before any pretended default, parted with all interest therein, with the assent of the respondents.

5th.

That the court erred in finding that the respondents by any act ever admitted any default or breach of the charter party, either as to the libellants or Forestier & Co.

6.

That the court erred in giving as admissions of any kind to the confidential communications between respondents and their agents in New Orleans, not made to the libellants, and only ob-
346 tained near the day of trial by the compulsory process of this court, not communicated to the libellants by the respondents, nor intended to be so communicated to them by the respondents, nor made with full knowledge of the facts.

7th.

That the court erred in finding that there was any contract, expressed or implied, in said charter party that the ship should become involved in the alleged grain contract of libellants, and that the cargo should be on board or laden before the last hours of June; that such limitation was unjust and unreasonable.

8th.

That the court erred in giving any effect or allowing any of the expenses of the pretended sale of the cargo by an auctioneer.

That it appears from the evidence not disputed that the Deronda, under the charter party, took on board, carried, and delivered the stipulated 10,000 quarters at the designated port of delivery within reasonable time, with no delays, except such as were caused by the wretched stowage of Gomila & Co.'s stevedore and their acts in seizing and detaining the ship by process; that it is impossible that there should be full performance and non-performance of the contract at the same time and by the same acts.

That the court erred in finding that the respondents, by any act or deed, have admitted any default or non-compliance with their contract obligations.

And on the basis of computation of damages no fault or breach had been established, and that the libellants be notified thereof.

347 GOMILA & Co. *vs.* CULLIFORD & CLARK. } No. 11965.

JUNE 5, 1884.

Proctor for respondents this day filing a motion for a new trial on grounds therein assigned, the court took time to consider.

Order. New Trial Refused and Order Fixing Appeal Bond at $15,000. *June* 11, 1884.

GOMILA & Co. *vs.* CULLIFORD & CLARK. } No. 11965.

The court perceiving no reasons to disturb the judgment of the 2d June, 1884, it is ordered that the motion for a new trial be over-

ruled and a new trial refused, with costs; and the court having been asked to fix the amount of the appeal bond in the cause fixes the same at $15,000, with good and sufficient surety, to operate as a supersedeas.

Appeal by Respondents. *June* 14, 1884.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

On motion of J. R. Beckwith, J. McConnell, and H. E. Upton, proctors for the defendants herein; J. H. W. Culliford and John S. Clark, impleaded as copartners under the firm of Culliford & Clark, and of Thomas D. Miller and Emile L. Carriere, and on showing
that a final decree was herein rendered on the 2d and signed
348 on the 12th June, 1884, against them; that they are informed
and believe there is error to their prejudice in said decree, and they are desirous of taking a suspensive appeal therefrom—

It is ordered by the court that an appeal from said decree be allowed and is hereby granted the above-named owners herein, to act as a supersedeas, to the circuit court of the U. S. for the 5th circuit and eastern district of Louisiana, returnable on the 1st day of the next regular term of the said circuit court, upon the said defendants and movers herein giving bond in the sum of fifteen thousand dollars, with good and solvent security, conditioned as the law directs.

349 *Appeal Bond.*

UNITED STATES OF AMERICA, *Eastern District of Louisiana:*

District Court of the United States. In Admiralty.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11695.

Know all men by these presents that we, J. H. W. Culliford & John S. Clark, & Culliford & Clark, and Thos. D. Miller and Emile L. Carriere, as principals, and John Drysdale and Gilbert H. Green, as sureties, are held and firmly bound unto Gomila & Co., libellants in the above entitled and numbered suit, in the sum of fifteen thousand ($15,000) dollars, to be paid to the said Gomila & Co.; for the payment of which, well and truly to be made, in lawful money of the United States, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at New Orleans the — day of June, 1884.

Whereas the above-named J. H. W. Culliford, John S. Clark, Culliford & Clark, Thos. D. Miller, & Emile L. Carriere have ap-

pealed to the next term of the circuit court of the United States for the 5th circuit and eastern district of Louisiana from a final judgment of the district court of the United States for said district, rendered against them on the 2d day of June, 1884, and signed on the 12th day of June, 1884, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named appellants shall prosecute their appeal to effect and answer all damages and costs and satisfy whatever judgment may be rendered against them if they fail to make their appeal good, then this obligation to be void; otherwise the same shall be and remain in full force and effect.

J. H. W. CULLIFORD. [L. S.]
JOHN S. CLARK. [L. S.]
CULLIFORD & CLARK, [L. S.]
By their counsel, J. McCONNELL.
THOS. D. MILLER. [L. S.]
E. L. CARRIERE,
By his counsel, J. McCONNELL.
JOHN DRYSDALE. [L. S.]
GILBERT H. GREEN. [L. S.]

Signed, sealed, and delivered in presence of—
J. McCONNELL.

Bond approved June 16, 1884.
EDWARD C. BILLINGS. *Judge.*

This bond accepted.
J. WARD GURLEY, Jr.,
Proctor for Libellants.

John Drysdale & Gilbert H. Green, surety on the within appeal bond, being duly sworn, says, each for himself, that he resides in this city and is worth the sum of $15,000 over and above his just debts and liabilities.

JOHN DRYSDALE.
GILBERT H. GREEN.

Sworn to and subscribed before me this — day of ——, 188–.
—— ——.

[Endorsed:] No. —. United States district court. —— —— *vs.* —— ——. Appeal bond. Filed —— —, —. —— ——, clerk.

350 *Appeal by Libellants. June* 16, 1884.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 11965.

Proctors for libellants suggesting that they feel aggrieved by the final judgment of the court rendered on 2d instant, and desiring to appeal therefrom—

Ordered that they be allowed an appeal from said, judgment returnable to the circuit court of the U. S. for this district on the 1st day of its next regular term, on giving bond for costs in the sum of $500, with surety, according to law.

351 *Appeal Bond.*

UNITED STATES OF AMERICA, *Eastern District of Louisiana:*

District Court of the United States. In Admiralty.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. —.

Know all men by these presents that we, A. J. Gomila & Larned Torrey, composing the commercial firm of Gomila & Co., as principals, and J. B. Camors, as surety, are held and firmly bound unto J. H. W. Culliford and John S. Clark, composing the firm of Culliford & Clark, in the sum of five hundred dollars, to be paid to the said Culliford & Clark; for the payment of which, well and truly to be made, in lawful money of the United States, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at New Orleans the 17 day of June, 1884.

Whereas the above-named Gomila & Co., composed of A. J. Gomila & Larned Torrey, have appealed to the next term of the circuit court of the United States for the 5th circuit and eastern district of Louisiana from a final judgment of the district court of the United States for said district, rendered against them on the 2 day of June, 1884, and signed on the 12 day of June, 1884, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named appellants shall prosecute their appeal to affect and answer all damages and costs and satisfy whatever judgment may be rendered against them if they fail to make their appeal good, then this obligation to be void; otherwise the same shall be and remain in full force and effect.

GOMILA & CO. [L. S.]
J. B. CAMORS. [L. S.]

Signed, sealed, and delivered in the presence of—

—— ——.

Bond approved June 17, 1884.

EDWARD C. BILLINGS, *Judge.*

Bond approved.

J. McCONNELL, *Proctor.*

——— ———, surety on the within appeal bond, being duly sworn, says that he resides in this city and is worth the sum of $— over and above his just debts and liabilities.

——— ———.

Sworn to and subscribed before me this — day of ———, 188–.

——— ———.

[Endorsed:] No. —. United States district court. ——— ——— *vs.* ——— ———. Appeal bond. Filed ——— —, —. ——— ———, clerk.

352 United States District Court in and for the Eastern District of Louisiana.

CLERK'S OFFICE.

I hereby certify that the foregoing 597 pages do form and contain a true and correct transcript of the originals on file and of record in the matter of Gomila & Co. *vs.* Culliford & Clark, numbered 11965, in admiralty, of the docket of the said court.

In faith whereof I have hereto set my hand and the seal of our said court, at New Orleans, in said district, this 5th day of July, A. D. 1884.

K. LOEW, *Clerk*,
——— ———, *D'y.*

I, Edward C. Billings, U. S. judge for the eastern district of Louisiana, do hereby certify that John Devonshire, whose genuine signature is affixed to the foregoing certificate, is, and was at the time of signing the same, the duly qualified clerk of the United States district court for said district; that full faith and credit are due and owing to all his acts as such, and that the said attestation is in due form of law.

Witness my hand and seal, at the city of New Orleans, in said district, this — day of ———, A. D. 188–.

——— ———, *Judge.* [L. S.]

353 *Proceedings in the United States Circuit Court.*

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

354 *Hearing and Continuance.*

Extract from the Minutes, November Term, 1884.

NEW ORLEANS, SATURDAY, *December 20th*, 1884.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge.

United States Circuit Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

This cause came on to be heard on the transcript of the record from the district court of the United States for the eastern district of Louisiana, when, by consent of the respective parties, the same was continued, with preference, until the 6th day of January, 1884, at 11 o'clock a. m.

Continuance.

Extract from the Minutes, November Term, 1884.

NEW ORLEANS, MONDAY, *January 5th*, 1885.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

By agreement of the proctors for the respective parties and with the consent of the court this cause, heretofore continued to the 6th inst., is reassigned for trial on the 12th day of January, 1885, at 11 o'clock a. m.

355 *Continuance.*

Extract from the Minutes, November Term, 1884.

NEW ORLEANS, MONDAY, *January* 12, 1885.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

United States Circuit Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

By consent of parties, respectively, and with leave of the court first had and obtained this cause is continued for trial to Monday, the 19th instant, at 11 o'clock a. m.

Continuance.

Extract from the Minutes, November Term, 1884.

NEW ORLEANS, MONDAY, *January* 19, 1885.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

United States Circuit Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

This cause came on to be heard on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued in part by the proctors for the respective parties and continued to the 21st instant for further argument.

356 *Defendants' Offer of Testimony.*

United States Circuit Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

Testimony of John Beattie.

Certificate of W. M. Baker, surveyor, dated June 29, 1883, marked C No. 3.

Letter of E. Forestier & Co., dated July 5, 1883, marked C No. 2.

Letter of E. Forestier & Co., same date, marked ——.

Letter of De Wolf & Hammond to Gomila & Co. & E. Forestier & Co., charterers, marked C No. 4.

Letter of De Wolf & Hammond to Gomila & Co., of July 12, 1883, marked C No. 1.

Charter to Gomila & Co., 19 June, 1883, with cancellation endorsed thereon, marked A 3.

Charter, June 19, 1883, to E. Forestier & Co., marked A 4.

Certificate of registry, marked B No. 5.

Certificate of F. Conway & W. M. Baker, inspectors, dated July 13, 1883, marked B No. 1.

Protest of July 6, 1883, of Gomila & Co., by De Wolf & Hammond, agents, before J. G. Eustis, N. P., marked B No. 2.

Protest of July 6, 1883, by same, of E. Forestier & Co., marked B No. 3.

Protest of July 7, 1883, by capt. & agents of S. S. Deronda, of Gomila & Co., & E. Forestier & Co., marked B No. 4.

The admission in behalf of the defendants, noted in the record.

357 Testimony of W. H. De Wolf and documents therewith, filed and noted in the record as having been offered by the defendants.

The above is offered subject to the objections noted in the record

Defendants also specially object to the introduction in evidence of the private telegrams and correspondence called for, *subpœna duces tecum*, between De Wolf & Hammond or either of them with Culliford & Clark, and only in the event of this objection to the competency and admissibility thereof being overruled and the portions thereof offered by libellants being received in evidence do they offer all telegrams and letters produced by Mr. De Wolf in answer to said *subpœna duces tecum* which are not included in the offer of testimony made by the libellants, which offer is made thus conditionally and as rebutting testimony.

Defendants also offer all the evidence & testimony which appears from the transcript of the record to have been offered by them on the several occasions of taking testimony before the clerk of the district court.

Defendants also offer—

Bill of Alfred & Neeb for stevedoring, as found in the transcript of the record, p. 76.

Also testimony of A. K. Miller.

Also testimony of W. G. Coyle.

Also bill of charges for loading the S. S. Deronda by Gomila & Co., attached to the testimony of A. K. Miller, with the admissions in regard thereto and the admission by counsel in open court that the S. S. Deronda has not returned to the port of New Orleans since July, 1883.

Also certificate of registry, marked B No. 5.

358 *Testimony of A. K. Miller. Filed Jan'ry* 19, 1885.

United States Circuit Court, Fifth Judicial Circuit, Eastern District of Louisiana.

GOMILA & CO.
vs.
CULLIFORD & CLARK. } No. —.

Testimony taken on behalf of the respondents at the office of James McConnell, Esq., New Orleans, La., January 5th, 1885; reported by Mark Breeden, Jr, notary public & stenographer, No. 6 Carondelet street, New Orleans, La.

Appearances: Rouse & Grant, for libellants; J. McConnell, Esq., for respondents.

Witness: A. K. Miller, Esq., pages 2 to 3.

359 A. K. MILLER recalled; examined in chief, on behalf of the respondents, by Mr. MCCONNELL as follows:

Q. Mr. Miller, in the month of July, 1880, was the steamship Deronda in this port?
A. She was, sir.
Q. Who were the agents of that steamship in this port?
A. We were the agents—A. K. Miller & Co.
Q. What date did she sail from this port?
A. She sailed on the 10th.
Q. Of July, 1880?
A. And cleared on the 9th.
Q. With what cargo was she loaded from here on that trip?
A. Well, this is an abstract from our books which I have examined, which I found in accordance with our books (witness refers to a memorandum, which he produces): 36,028$\frac{4}{6}\frac{0}{0}$ bushels of wheat or 4,503 quarters; 49,290$\frac{3}{5}\frac{0}{6}$ bushels of corn or 5,750 quarters; total, 10,253 quarters.
Q. Who were the shippers?
A. Eugster & Co., I think, were the shippers.

By Mr. MCCONNELL: It is admitted that the weight of wheat is sixty pounds to the bushel. It is admitted that this is the same steamship Deronda referred to by Mr. Gomila in his testimony.

Cross-examination by Mr. GRANT as follows:

Q. Do you know how much coal was shipped on board the vessel at that time?

360 A. I do not know, sir. I can tell what is purchased here by the ship's account, but I don't know what she had on board besides.

Q. Do you know whether any cargo was stored in the cross-bunkers?
A. No, sir.
Q. Do you know the difference between the cubical contents of a bushel of wheat and of corn?
A. Between the cubical contents of a bushel of wheat and corn?
Q. Yes, sir.
A. Well, I have never entered into the calculation.
Q. Is there any difference?
A. Well, I should not say there is any, because it is measured in England. When they measure in bushels they use the same size bushels.

Finis.

361 *Testimony of W. G. Coyle. Filed Jan'ry* 19, 1885.

United States Circuit Court, Fifth Judicial Circuit, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. —.

Testimony taken by consent at the office of James McConnell, Esq., New Orleans, La., January 3rd, 1885, on behalf of the respondents; reported by Mark Breeden, Jr., notary & stenographer, No. 6 Carondelet St., New Orleans, La.

Appearances: J. W. Gurley, Jr., Esq., for libellants; J. McConnell, Esq., for respondents.
Witness: W. G. Coyle, Esq., pages 2 to 3; Exhibit G, page 4.

362 W. G. COYLE sworn by Mark Breeden, Jr., Esq., notary public; examined in chief, on behalf of the claimants, by Mr. MCCONNELL as follows:

Q. Mr. Coyle, what is your business in New Orleans?
A. Coal merchant.
Q. Of what firm are you a member?
A. W. G. Coyle & Co.
Q. For how long have you been in that business?
A. 28 or 29 or 30 years.
Q. Is it part of your business to coal steamships in this port?
A. Yes, sir.
Q. On the 9th day of July, 1880, did you coal any steamship in this port?
A. Yes, sir; we coaled the Deronda.
Q. How many tons of coal did you put on board of her that day?
A. Two hundred and something.
Q. Look at this memorandum, which bears your signature.
A. (Witness looks at it.) Two hundred and twenty-four tons.
Q. Have you looked at your books to refresh your memory with regard to it?
A. Yes, sir.
Q. For what use was that coal taken on board of the boat; was it bought for the purpose of speculation or was it for fuel?
A. We put it in the bunkers.
Q. That is not an answer to my question.
A. Well, coal in the bunkers is always for fuel. In the hold it may be for other purposes—for sale—but in the bunkers it is for fuel.

363 Q. This was for fuel?
A. Yes, sir; we took it for granted it was, as it went in the place therefor.

Q. You were on board that day?
A. Yes, sir.

Cross-examination by Mr. GURLEY as follows:

Q. Was all that coal put in the bunkers—was it all put in the bunkers?
A. I think it was; I saw it being put in the bunkers; I did not stay there during the entire time it was being put in; consequently I cannot swear to it, but I saw some of it being put in.
Q. Do you know where the vessel was going to on that voyage?
A. What port? No, no.
Q. Do you know whether she had the privilege of coaling elsewhere?
A. I do not; I never ask any questions.
Q. How many bunkers did she have at that time?
A. How many bunkers?
Q. Yes, sir; coal bunkers.
A. We generally put in two; sometimes there are three in a ship, but always two; sometimes three.
Q. Do you remember how many she had at that time?
A. I do not know; we put in two, but she may have had more.

Finis.

364 By Mr. MCCONNELL: I offer in evidence bill amounting to $524.50, dated June 30th, 1884, marked G.

By Mr. GURLEY: Which I admit was furnished by libellants to Mr. McConnell, and that the same was charged and collected by Gomila & Co.

365 *Continuance.*

Extract from the Minutes, November Term, 1884.

NEW ORLEANS, WEDNESDAY, *January* 21, 1885.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

United States Circuit Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

This cause, as continued from the 19th instant, came on further to be heard, and, having heard further argument from the proctors for parties in interest, the court ordered said cause to be continued until Friday, the 23rd instant, at 11 o'clock a. m.

Continuance.

Extract from the Minutes, November Term, 1884.

NEW ORLEANS, FRIDAY, *January 23rd*, 1885.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

United States Circuit Court, Eastern District of Louisiana.

GOMILA & CO.
vs.
CULLIFORD & CLARK. } No. 10669.

This cause, as continued from the 21st instant, came on further to be heard, and, having been argued by proctors for libellants, was submitted, when the court took time to consider.

366 *Protest by Agents & Captain of S. S. Deronda, of Gomila & Co., & E. Forestier & Co. Nunc pro Tunc as of Oct.* 7, 1884. *Filed January* 26, 1885.

UNITED STATES OF AMERICA,
State of Louisiana, Parish of Orleans, City of New Orleans:

Be it known that on this seventh day of the month of July, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and eighth, before me, John G. Eustis, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared George H. Eldridge, captain of the steamer "Deronda," and W. H. De Wolf, of the firm of De Wolf & Hammond, agents for the steamship "Deronda," acting on behalf of the owners of said steamship, who declared that whereas on the sixth day of July inst., 1883, a written notice was served on Gomila & Co. and E. Forestier & Co., charterers and transferees, that the said steamship would be ready to receive balance of freight on the 7th July, 1883, at 10 a. m., at this port; and whereas the said appointed time has arrived and passed and no compliance has been made or attempted to be made with said notice and demand:

Now, therefore, the said appearers, acting in behalf of said
367 steamship Deronda and her owners, do solemnly and publicly make this formal protest for the protection of the rights and interests of said steamer and her owners in the premises—

Protesting that the said steamer was at the said date and hour named, to wit, July 7th, at 10 o'clock a. m., and is now in readiness to receive from the said charterers and transferees, Gomila & Co. and E. Forestier & Co., the balance of the said cargo as per charter

party, and hereby protest said charterers and transferees for not delivering the same, and will hold the said Gomila & Co. and E Forestier & Co. and all others who it may or doth concern, jointly and severally, liable for any and all loss, demurrage, or damage of any and every nature that has or may arise in the premises.

Thus done and protested on the day and year above mentioned, in the presence of Henry M. Hyams and James Tyman, lawful witnesses, who have hereto signed their names with the appearers and the notary.

(Original signed) GEO. H. ELDRIDGE, *Master.*
W. H. DE WOLF,
Of De Wolf & Hammond, Agents S. S. Deronda.
H. M. HYAMS.
JAS. TYMAN.
J. G. EUSTIS, *Not. Pub.*

A true copy of the original on record in my office.
[SEAL.] (Signed) J. G. EUSTIS,
Notary Public.

368 *Continuance.*

Extract from the Minutes, November Term, 1884.

NEW ORLEANS, FRIDAY, *February* 20, 1885.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

United States Circuit Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

This cause came on to be heard at this term upon the pleadings and evidence and was argued, and thereupon, upon consideration of the evidence, the court finds the following as the facts in the case:

First.

On the seventh day of June, 1883, Gomila & Co., who were large grain dealers in the port of New Orleans, entered into the following grain contract:

"Bought from Gomila & Co. by Messrs. E. Forestier & Co., at the price of (60 cts.) sixty cents per bushel of 56 lbs., on board seller's vessel, with freight at (6) six shillings per quarter, and to be shipped from New Orleans during the month of June, not later than the 30th (midnight), seller's option, a cargo of not over 12,000 and not under 10,000 quarters (480 lbs.) of No. 2 mixed corn of the standard of New Orleans inspection. Destination: Elsinore, for orders to Copenhagen

or Aarhons. Any difference in freight for account of seller; cash on delivery of documents.

"New Orleans, June 7th, 1883.

"(Signed) GOMILA & CO."

369 A similar copy was made at the same time, signed "Forestier & Co."

Second.

June 18th, 1883, the steamship Deronda, of which J. H. W. Culliford was the sole owner, though Culliford and Clark, claimants, were the apparent owners and agents in England, and of which De Wolf & Hammond were the New Orleans agents, arrived in the port of New Orleans with a cargo of salt and fruit, and her agents in New Orleans, Messrs. De Wolf & Hammond, opened negotiations with Gomila & Co. for a charter. Gomila & Co., having the contract aforesaid with Forestier & Co., were desirous to charter, but insisted on owners' guarantee that the Deronda would carry 10,000 quarters of 480 lbs., whereupon the following cable dispatch was sent to Hammond, of De Wolf & Hammond, who was then in Europe and in communication with claimants:

"JUNE 16TH.

"To W. J. Hammond, Liverpool:

"Deronda. Am offered 5–6: Copenhagen, Aarhons, calling at Elsinore for orders. She must be guaranteed to carry not less than 10,000 quarters, charterers to have power of cancelling charter party if vessel is not ready to load cargo by 25th of June."

To which dispatch the following reply was sent:

"JUNE 18TH.

"Fix Deronda 5–6. Aarhons, guarantee 10,000 quarters provided captain agrees quantity; lighterage at charterers' risk and expense. Try 5–9.

"(Signed) W. J. HAMMOND."

Third.

On the 18th De Wolf, agent, and the master called on Gomila & Co. and consulted as to whether the Deronda could carry 10,000 quarters of corn, the question relating more to space than to weight. At this consultation calculations were made by Mr. Gomila, of the firm of Gomila & Co., and the master as to the cargo space of the steamer, from her general plan both reaching the conclusion
370 that the steamer would be able to carry 10,000 quarters, and Gomila advised the master to so cable the owners. A cable message was then made up by the master and De Wolf from Gomila's code book, in which the master said the vessel "will carry 10,000 quarters of grain if we may coal at Halifax." After the said message was prepared Gomila gave as his reasons for insisting on a guarantee the aforesaid contract with Forestier & Co., which was

produced and read, and Gomila stated that he had no use for any vessel that would not carry 10,000 quarters of grain; that he must have a guarantee, and feared that if the vessel would not carry that amount the consequences would be serious; that the market had declined and was still declining and the loss would be very heavy, because the buyer would have the right to reject the cargo if the conditions were not strictly fulfilled. The same day the following cable message was sent by ship's agents:

"JUNE 18TH.

"To W. J. Hammond, Liverpool:

"Deronda. Captain's opinion she can carry 10,000 quarters, coaling Sidney; have closed as follows, subject to owner's approval, 5–9, calling at Elsinore for orders: Copenhagen, Aarhons, charterers' option. Cork or Falmouth for orders, 5–3, to discharge at a safe port in U. K. or Continent, Bordeaux to Hamburg. If ordered to U. K. direct, 3*d.* off; if ordered to Continent from port of call, 10 per cent. additional.

"(Signed) DE WOLF & HAMMOND."

To which message, on June 19th, De Wolf & Hammond received the following answer:

"JUNE 19TH.

"Fix Deronda. After hard work got Culliford. Owners accept your offer, but you must exclude Rouen; cannot go there.

"(Signed) W. J. HAMMOND."

371 Fourth.

On June 19th the charter party was entered into, of which a true copy is attached to the libel—except the endorsement in red ink across the face—and is made part of this finding.

Fifth.

The cancelling date of said charter party was not fixed, because Gomila & Co. waived it, as the ship was in port and they had confidence in the ability and willingness of the master to get the ship ready in time.

Sixth.

On the 28th of June the ship was ready to receive cargo and the loading then commenced. No formal tender appears to have been made of the ship of that day, but the loading was commenced with the consent of all concerned. The loading was continued, with slight interruptions from rain, and until twenty minutes past three o'clock in the afternoon of the 30th of June, when the loading was stopped and the ship was declared by the underwriters' inspector to be full all over and ready to proceed on her voyage, and the inspector gave his certificate to that effect.

372 She had then only 9,635 quarters on board, equivalent to $82{,}588\frac{2}{5}\frac{2}{6}$ bushels, and could take no more with safety, as she was then loaded and stowed, although libellants had the balance of the cargo of 10,000 quarters in barges alongside, and it could have been put on board before midnight if the ship could have taken it.

Seventh.

After the loading had begun, and before it was known whether the Deronda could take the guaranteed quantity, all parties supposing that she could, Gomila & Co., as is usual in such cases, handed their copy of the charter party to Forestier & Co.; the latter without, authority from the charterers, took the copy to the ship's agents unendorsed and obtained a charter in their own name, but otherwise the same in all respects as charter to Gomila & Co. for the purpose, as they explained, of appearing to their correspondents as original parties. Gomila & Co. were advised of this by De Wolf & Hammond before the loading was finished, on June 30th, but replied to him that they would not object to such change if the vessel fulfilled the guarantee in the charter, but that if she failed they would expect the return of the papers.

373 On this point the court finds that said Gomila & Co. did not authorize the surrender of their charter and the giving of a new one to Forestier & Co. save upon the condition that the Deronda should first execute her guarantee.

Eighth.

When, on the 30th of June, the steamer was loaded, as described in the sixth finding, all parties had not noticed at once that the steamer could not carry the quantity guaranteed; whereupon Gomila, who was about to depart for St. Louis, left the matter in the hands of Bangston, of Forestier & Co., to arrange, instructing him, substantially, as follows: "I have no doubt this matter can be arranged with the owners, and anything you do to protect me I will be satisfied with. It seems to me the best way to arrange the matter would be to telegraph to the owners that if they will take the cargo off our hands at twenty-eight one and one-half pence, as agreed upon, no one will be injured and I will be satisfied; but in case they do not do this, then all that I ask is to be made whole in my contract, and you can make negotiations to that effect." Forestier & Co. cabled their correspondence as follows:

"Deronda. We have shipped 9,600 quarters; reply if in order or not. What do you propose? Cable at once."

And received answer July 2d to refuse Deronda.

And De Wolf & Hammond cabled claimants as follows:

"JUNE 30.

"To Culliford & Clark, Sunderland:

"Deronda loaded; carries 9,635 quarters; cargo sold not less than 10,000 quarters; Copenhagen, 28–3; present value, 25; buyers refuse acceptance, as cargo falls short; charterers hold ship responsible; advise.

"(Signed) DE WOLF & HAMMOND."

To this last dispatch the following was sent:

"JULY 1ST.

374 "Complete swindle; captain knows ship discharged 10,380 Bordeaux; compromise; pay value grain.

"(Signed) CULLIFORD & CLARK."

It does not appear that charterers had any knowledge of these last-mentioned dispatches until long afterwards.

Ninth.

Negotiations were opened and continued between the parties with a view to compromise, but without result until July 5th, on which day Forestier & Co. notified Gomila & Co. that they refused the cargo, because it was short and their buyers in Copenhagen had declined to accept it. They claimed damages of Gomila & Co. for violation of the contract of sale, consisting in the loss of their commissions, amounting to $3,194.39, which Gomila & Co. paid.

Tenth.

From July 3rd to July 5th Gomila & Co. telegraphed to some of the best-known dealers in England and France for quotations and offers. The best offer was twenty-three shillings, ordinary terms, or twenty-four shillings, rye terms (shippers guarantee sound condition on arrival). The weather being warm and likely to injure the cargo, they then declined to sell the cargo on board at the shippers' risk in the port of New Orleans, with the privilege of the charter, and so notified Messrs. De Wolf & Hammond, at the same time giving the owners the option of taking the cargo at the price to which it had been sold to Forestier & Co.

Eleventh.

On the sixth of July the ship's agents notified Gomila & Co. that they would take out coal and make room for the balance of the cargo, and that the ship would be made ready by the seventh. Gomila & Co. refused this proposal. In the meantime Gomila & Co. had given notice in the daily papers published in New Orleans
375 that the cargo would be sold at public auction to the highest bidder, for cash, on July 7th, by one of the licensed auctioneers of the city. Against this proposed sale the agents made public protest, on the part of the steamer, both on July 6th and 7th. The sale, however, took place as advertised, and the 9,635 quarters then on board were sold, for $29,622.34, to A. Carriere & Sons, with privilege of the charter. A. Carriere & Sons afterwards sold the cargo, with privilege of charter, to J. B. Camors & Co., and the latter in turn resold to Forestier & Co., at prices which do not appear.

Twelfth.

On July 13th, the stowage of the Deronda having been in the meantime rearranged and a large quantity of coal and water having been taken out, the Deronda was again tendered to both Gomila & Co. and to Forestier & Co., demanding balance of cargo. This was furnished by J. B. Camors & Co., and enough more grain was taken aboard to make over 10,060 quarters, with which the ship sailed, on the 18th of July, for her original destination and there safely arrived and delivered cargo.

Thirteenth.

The carrying capacity of the Deronda for grain on voyages from New Orleans to Europe, when fitted out with a minimum of coal and water, thus furnishing maximum of cargo space, was over 10,000 quarters, but as she was fitted out and prepared and tendered, in the manner hereinbefore found, to Gomila & Co. on June 28th, 1883, she could not with safety, under maritime and underwriters' rules, carry a cargo of 10,000 quarters, and she failed to receive such cargo, as hereinbefore found. By this failure the libellants lost the advantage of their said sale to Forestier & Co.

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Fourteenth.

The sale of the cargo at public auction was fairly conducted and, under the circumstances, was necessary and proper for the protection of the rights of all parties.

Fifteenth.

By the inability and failure of the steamer to receive, when first tendered to Gomila & Co., a cargo of 10,000 quarters they suffered loss as follows:

1st. Amount of commission paid Forestier & Co.	$3,194 29
2d. Loss on 9,635 quarters (82,588$\frac{2}{5}\frac{2}{6}$ bushels) of corn, being the difference between the price of the sale to Forestier & Co. and the sale at auction to Carriere & Sons	20,549 39
3rd. Loss on 365 quarters (3,126 bushels)	250 08
Making a total loss to Gomila & Co., by the failure aforesaid of twenty-three thousand nine hundred and ninety-three and $\frac{76}{100}$ dollars	$23,993 76

Sixteenth.

That although J. W. H. Culliford was the sole owner of the "Deronda," and the firm of Culliford & Clark, composed of said J. H. W. Culliford and John S. Clark, defendants herein, was really the managing agent of said owner, yet the fact is, as shown by the evidence, that the said Culliford & Clark held themselves out and

dealt with libellants in relation to the said "Deronda" as owners thereof, and therefore are liable on the said charter party as owners to the libellants for all damages arising from the default under said contract.

And the court does find, as conclusions of law, as follows:

1st. That under said charter party the defendants were
377 bound under their guarantee to see that when the Deronda was tendered to the libellants for loading that she was fitted, prepared, and arranged so as to be able to carry not less than 10,000 quarters of grain under underwriters' and maritime regulations.

2d. That the said defendants were charged with full notice in law of the special objects and purposes of libellants in effecting said charter, and therefore are liable to the said libellants for the amount of damages suffered by the latter from inability to sell and deliver under the grain contract with Forestier & Co.

3rd. That the amount of such damages was the sum of $23,993.76 dollars.

4th. That libellants should have judgment for that amount, with legal interest *for* June 30th, 1883, against the defendants and against their sureties on the release bond in attachment.

Considering the aforesaid findings of fact and law, and the same being in favor of libellants and against defendants, it is ordered, adjudged, and decreed that the libellants, A. J. Gomila and Larned Torrey, composing the firm of Gomila & Co., do recover from the respondents, J. W. H. Culliford and John S. Clark, composing the firm of Culliford and Clark, the sum of twenty-three thousand nine hundred and ninety-three dollars and seventy-six cents ($23,993.76) damages, with 5 per cent. interest from 30th June, 1883, till paid, and costs of suit.

And whereas the steamship Deronda, the property of the respondents, had been seized under the writ of attachment issued in the cause, but said seizure was released and the vessel restored to the owners on giving bond and security according to law—

It is further adjudged and decreed that J. W. H. Culliford and John S. Clark, copartners under the firm name of Culliford & Clark,
owners of said steamship, as principals on the release bond
378 (by G. H. Eldridge, master and their lawful bailee) and Thos. D. Miller and Emile L. Carriere, of New Orleans, as sureties on said release bond, be condemned *in solido* to pay the foregoing judgment, interest, and costs.

379 United States Circut Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

On motion of J. McConnell, J. R. Beckwith, & H. E. Upton, proctors for the defendants, it is ordered by the court that the plaintiffs do show cause, on Saturday, Feb'y 28th, 1885, why a new trial

should not be granted herein and the judgment herein filed on the 19th inst. and entered on the minutes of the 20th inst. should not be set aside on the following grounds:

1st. Because the said judgment is contrary to the law and the evidence.

2nd. Because the second, third, fourth, fifth, sixth, seventh, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, —sixteenth findings of fact are not sustained by the evidence nor in accordance therewith in manner and form as found.

3rd. That the said findings of fact should be materially modified & changed to comply fully with the evidence.

4th. That the findings of fact submitted to the court in behalf of the defendants and rejected should be adopted severally.

5th. That the several conclusions of law are erroneous, more especially in holding that the amount of the damage sustained by libellants was $23,993.76 and interest; that any part thereof was due by defendants to said libellants; that defendants ever tendered said ship on the 28th as ready for loading, or that defendants
380 were charged with notice of the special purposes & objects of libellants, &c., &c.

6th. That the court erred in confining its consideration of the case to the three issues named and in disregarding the evidence offered by defendants showing that the libellants had failed utterly to comply with and perform the covenants and undertakings stipulated on their part to be kept and performed by the terms of the charter party, as was alleged by the libellants in their libel and denied in the answer, and, therefore, distinctly at issue.

That among other covenants assumed by said libellants in said charter party one was that they should appoint "a stevedore for loading said steamer" at "current rates for such labor."

That the evidence shows that, in utter violation and disregard of said obligation, said libellants undertook the loading of said steamer themselves, through their own employees operating their grain elevator, and that the said employees, Alfred & Neeb, were not regular stevedores and were grain trimmers & unfit to perform the loading of said ship properly; that said libellants employed said Alfred & Neeb at cheap or half rates and not at current rates for such labor, and paid them the sum of only $—, but that said libellants themselves charged and collected from the agents of said ship the full or current rates, to wit, the sum of $—, for the same labor of loading said ship performed by Alfred & Neeb, the libellants themselves retaining the difference in amount between the two bills.

That it would be illegal and inequitable to hold the owners of said ship responsible for improper loading so occasioned by the libellants themselves, or for consequences to which the evidence shows they directly contributed.

381 *Findings of Fact, Conclusions of Law, and Decree. Entered and Filed* 28 *Feb'y*, 1885.

United States Circuit Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

The findings of fact and law and the judgment thereon heretofore entered in this case needing correction in several points, it is ordered that the same be annulled and vacated and that the following be entered in lieu:

Appeal in Admiralty.

United States Circuit Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

This cause came on to be heard at this term upon the pleadings and evidence and was argued, and thereupon, upon consideration of the evidence, the court finds the following as the facts in the case:

First: On the seventh day of June, 1883, Gomila & Co., who were large grain dealers in the port of New Orleans, entered into the following grain contract:

"Bought from Gomila & Co., by Messrs. E. Forestier & Co., at the price of (60 cts.) sixty cents per bushel of 56 lbs., on board
382 seller's vessel, with freight at (6*s*.) six shillings per quarter, and to be shipped from New Orleans during the month of June, not later than the 30th (midnight), (seller's option), a cargo of not over 12,000 and not under 10,000 quarters (480 lbs.) of No. 2 mixed corn of the standard of New Orleans inspection. Destination: Elsinore, for orders to Copenhagen or Aarhons. Any difference in freight for account of seller; cash on delivery of documents.

"New Orleans, June 7th, 1883.

"(Signed) GOMILA & CO."

A similar copy was made at the same time, signed "Forestier & Co."

Second. June 18th, 1883, the steamship Deronda, of which J. H. Culliford was the sole owner, though Culliford & Clark, claimants, were the apparent owners and agents in England, and of which De Wolf & Hammond were the New Orleans agents, arrived in the port of New Orleans with a cargo of salt and fruit. Her agents in New Orleans, Messrs. De Wolf & Hammond and Gomila & Co., had

opened negotiations for a charter on the 16th of June. Gomila & Co., having the contract aforesaid with Forestier & Co., insisted on owner's guarantee that the Deronda would carry 10,000 quarters of 480 lbs., whereupon the following cable dispatch was sent to Hammond, of De Wolf & Hammond, who was then in Europe and in communication with claimants:

"JUNE 16TH.

"To W. J. Hammond, Liverpool:

"Deronda. Am offered 5–6, Copenhagen, Aarhons, calling at Elsinore for orders. She must be guaranteed to carry not less than 10,000 quarters; charterers to have power of cancelling charter party if vessel is not ready to load cargo by 25th of June."

To which dispatch the following reply was sent:

"JUNE 18TH.

"Fix 'Deronda,' 5–6, Aarhons; guarantee 10,000 quarters. providing captain agrees quantity; lighterage at charterers' risk and expense. Try 5–9.

"(Signed) W. J. HAMMOND."

383 Third. On the 18th De Wolf, agent, and the master called on Gomila & Co. and consulted as to whether the Deronda could carry 10,000 quarters of corn, the question relating more to space than to weight. At this consultation calculations were made by Mr. Gomila, of the firm of Gomila & Co., and the master as to the cargo space of the steamer, from her general plan, and her ability to carry 10,000 quarters of corn, both reaching the conclusion that the steamer would be able to carry 10,000 quarters, and Gomila advised the master to so cable owners. A cable message was then made up by the master and De Wolf from Gomila's code book, in which the master said "the vessel will carry 10,000 quarters of grain if we coal at Halifax." After the said message was prepared Gomila gave as his reasons for insisting on a guarantee the aforesaid contract with Forestier & Co., which was produced and read, and Gomila stated that he had no use for any vessel that would not carry 10,000 quarters of grain; that he must have a guarantee, and feared that if the vessel would not carry that amount the consequences would be serious; that the market had declined and was still declining and the loss would be very heavy, because the buyer would have the right to reject the cargo if the conditions were not strictly fulfilled. The same day the following cable message was sent by ship's agents:

"JUNE 18TH.

"To W. J. Hammond, Liverpool:

"Deronda. Captain's opinion she can carry 10,000 quarters, coaling Sidney; have closed, subject to owners' approval, 5–9, calling at Elsinore for orders Copenhagen, Aarhons, charterers' *opinion;* Cork or Falmouth for orders, 5–3, to discharge at a safe port in U. K. or Continent, Bordeaux to Hamburg. If ordered to U. K. direct, 3*d.* off. If ordered to Continent from port of call, 10% additional.

"(Signed) DE WOLF & HAMMOND."

To which message, on June 19th, De Wolf & Hammond re-
384 ceived the following answer:

"JUNE 19TH.

"Fix Deronda. After hard work got Culliford, owners, accept your offer, but you must exclude Rouen; cannot go there.

"(Signed) W. J. HAMMOND."

Fourth. On June 19th the charter party was entered into, of which a true copy is attached to the libel, except the endorsement in red ink across the face, and is made part of this finding.

Fifth. The cancelling date of said charter party was not fixed because Gomila and Co. waived it, as the ship was in port and they had confidence in the ability and willingness of the master to get the ship ready in time.

Sixth. On the 28th of June the ship was ready to receive cargo and the loading then commenced. No formal tender appears to have been made of the ship on that day, but the loading was commenced with the consent of all concerned. The loading was continued, with slight interruptions from rain, and until 20 minutes past three o'clock in the afternoon of the 30th of June, when the loading was stopped and the ship was declared by the underwriters' inspector to be full all over and ready to proceed on her voyage, and the inspector gave his certificate to that effect. She then had only 9,635 quarters on board, equivalent to $82{,}588\frac{2}{56}$ bushels, and could take no more with safety, as she was then loaded and stowed, although libellants had the balance of the cargo of 10,000 quarters in barges alongside, and it could have been put on board before midnight if the ship could have taken it.

Seventh. After the loading had begun and before it was
385 known whether the Deronda could take the guaranteed quantity, all parties supposing that she could, Gomila & Co., as is usual in such cases, handed their copy of the charter party to Forestier & Co. The latter, without authority from the charterers, took the copy to the ship's agent unindorsed and obtained a charter in their own name, but otherwise the same in all respects as charter to Gomila & Co., for the purpose, as they explained, of appearing to their correspondents as original parties. Gomila & Co. were advised of this by De Wolf, of De Wolf & Hammond, before the loading was finished, on June 30th, but replied to him that they would not object to such a change if the vessel fulfilled the guarantee in the charter, but that if she failed they would expect the return of the papers. On this point the court finds that Gomila & Co. did not authorize the surrender of their charter and the giving of a new one to Forestier & Co. save upon the condition that the Deronda should first execute her guarantee.

Eighth. When, on the 30th of June, the steamer was loaded, as described in the sixth finding, all parties had notice at once that the steamer could not carry the quantity guaranteed; whereupon Gomila, who was about to depart for St. Louis, left the matter in the hands

of Bangston, of Forestier & Co., to arrange, instructing him substantially as follows:

"I have no doubt this matter can be arranged with the owners, and anything you do to protect me I will be satisfied with. It seems to me the best way to arrange the matter would be to telegraph to the owners that if they will take the cargo off our hands at twenty-eight one and one-half pence, as agreed upon, no one will be
386 injured and I will be satisfied; but in case they do not do this then all that I ask is to be made whole in my contract, and you can make negotiations to that effect."

Forestier & Co. cabled their correspondence as follows:

"Deronda. We have shipped 9,600 quarters; reply if in order or not. What do you propose? Cable at once."

And received answer July 2 1 to refuse Deronda; and De Wolf & Hammond cabled claimants as follows:

"JUNE 30TH.

"To Culliford & Clark, Sunderland:

"Deronda loaded carries 9,635 quarters; cargo sold not less than 10,000 quarters. Copenhagen, 28–3; present value, 25; buyers refuse acceptance, as cargo falls short. Charterers hold ship responsible. Advise.

"(Signed) DE WOLF & HAMMOND."

To this last dispatch the following was sent:

"JULY 1ST.

"Complete swindle. Captain knows ship discharged 10,380 Bordeaux. Compromise; pay value grain.

"(Signed) CULLIFORD & CLARK."

"JULY 3D.

"To Culliford & Clark, Sunderland:

"Cargo on board, 2,065 tons maize, 170 tons coal; surveyors refuse load deeper; ship full all over; no advantage Newport; cargo sold, June loading; shippers can sell; Copenhagen, 25*s.*, you paying difference or owners buy cargo 28.3 cif.; best can do. Which do you advise? Cargo maize, No. 2 mixed, sail grade, very good. May we draw on you for same?

"(Signed) DE WOLF & HAMMOND."

To which the following answer was made:

"JULY 4.

"Counsel indemnity lawyer, McConnell. If he approves, dispatch Deronda; give bail if necessary. First telegram simply means paying difference value alleged short shipment; save delay.

"(Signed) CULLIFORD & CLARK."

It does not appear that charterers at the time had any knowledge of these dispatches.

387 Ninth. Negotiations were opened and continued between the parties with a view to compromise, but without result

until July 5th, on which day Forestier & Co. notified Gomila & Co. that they refused the cargo because it was short and their buyers in Copenhagen had declined to accept it. They claimed damages of Gomila & Co. for violation of the contract of sale, consisting in the loss of their commissions, amounting to $3,194.39, which Gomila & Co. paid.

Tenth. From July 3d to July 5th Gomila & Co. telegraphed to some of the best-known dealers in England and France for quotations and offers. The best offer was twenty-three shillings, ordinary terms, or twenty-four shillings, rye terms (shippers guarantee sound condition on arrival). Libelants then decided to sell the cargo on board at the shipper's risk in the port of New Orleans, with the privilege of the charter, and so notified Messrs. De Wolf & Hammond, at the same time giving the owners the option of taking the cargo at the price to which it had been sold to Forestier & Co.

Eleventh. On the sixth day of July the ship's agents notified Gomila & Co. that they would take out coal and make room for the balance of the cargo and that the ship would be made ready by the 7th. Gomila & Co. refused this proposal. In the meantime Gomila & Co. had given notice in the daily papers published in New Orleans that the cargo would be sold at public auction to the highest bidder for cash on July 7th by one of the licensed auctioneers of the city. Against this proposed sale the agents made public protest on the part of the steamer, both on July 6th and 7th. The sale, however, took place as advertised, and the 9,635 quarters then
388 on board were sold for $29,622.84 to A. Carriere & Sons, with privilege of the charter. A. Carriere & Sons afterwards sold the cargo, with privilege of charter, to J. B. Camors & Co., and the latter in turn resold to Forestier & Co. for the sum of $40,422.00. The charter to Gomila & Co. having been destroyed by De Wolf, they made protest for substitute, and then for want of such charter used copy of one issued to Forestier & Co. to make title.

Twelfth. On July 13th, the stowage of the Deronda having been in the mean time rearranged and a large quantity of coal and water, the latter from the ballast tanks, having been taken out, the Deronda was again tendered to both Gomila & Co. and to Forestier & Co., demanding balance of cargo. This was furnished by J. B. Camors & Co., and enough more grain was taken aboard to make over 10,000 quarters, with which the ship sailed on the 18th of July for her original destination, and there safely arrived and delivered cargo under the substitute for charter party provided as explained in finding 11.

Thirteenth. The cargo of the steamship Deronda was insured by E. Forestier & Co. in the New Orleans Insurance Company according to the following memorandum filed by the clerk of said insurance company:

Memorandum.

June 30.—Entered July 13. Sp. pol. 6813. S. S. Deronda, New Orleans, to Elsinore, for orders to Copenhagen or Aarhons, with

privilege of coaling ports, in name E. Forestier & Co., on 82,588 2/5/6 bushels corn (No. 2 mixed), sail grade, in bulk and ship's bags, F. F. P. A. E. C.; value, $48,950, @ 2 per cent. net; prem., $997 net.

Do. Sp. pol. 6814. Same on 82,588 2/5/6 bush. (No. 2 mixed)
389 corn, sail grade, in bulk and ship's bags, F. F. P. A. E. C.; capital, 5,175, @ 2 net; pr., $103.50 net.

E. Forestier & Co. never assigned these policies until they sold the exchange drawn by them against the rearranged and complete cargo (of which they, as aforesaid, became purchasers) to the Union National Bank, and then they endorsed said policies over to said bank.

The testimony does not show that there was any other insurance taken out on said cargo except a reinsurance for 10,000 francs, taken by the Teutonia Insurance Company on June 28th, 1883, in favor of the New Orleans Insurance Company, which reinsurance was cancelled by the Teutonia Company when, about July 5th, the manager of the Teutonia Co. learned that there was trouble about the cargo and that the owners were going to discharge coal and water for more cargo.

Fourteenth. The carrying capacity of the Deronda for grain on voyages from New Orleans to Europe, when properly fitted out, was over 10,000 quarters, and she had on a previous voyage, with 224 tons of coal in her bunkers, safely carried a cargo of 10,253 quarters of grain, but as she was fitted out and prepared and tendered in the manner hereinbefore found to Gomila & Co. on June 28th, 1883, she could not with safety, under maritime and underwriters' rules, carry a cargo of 10,000 quarters, and she failed to receive such cargo, as hereinbefore found. By this failure the libellants lost the advantage of their said sale to Forestier & Co.

Fifteenth. Corn is a perishable article in shipping, both as
390 to time and transit, and is always at risk in voyages across the ocean, particularly if it remains in the port of New Orleans under the heat of a July sun beating on the decks, in which case the risk is increased every day it remains in port.

Sixteenth. The sale of the cargo at public auction was fairly conducted, and, under the circumstances, was necessary and proper for the protection of the rights of all parties.

Seventeenth. By the inability and failure of the steamer to receive when first tendered to Gomila & Co. a cargo of 10,000 quarters they suffered loss as follows:

1st. Amount of commission paid Forestier & Co.	$3,194 29
2d. Loss on 9,635 quarters (82,588 2/5/6 bushels) of corn, being the difference between the price of the sale to Forestier & Co. and the sale at auction to Carriere & Sons	20,549 39
3rd. Loss on 365 quarters (3,126 bushels)	250 08
Making a total loss to Gomila & Co. by the failure aforesaid of twenty-three thousand nine hundred and ninety-three and 76/100 dollars	$23,993 76

Eighteenth. That, although J. H. W. Culliford was the sole owner of the "Deronda" and the firm of Culliford & Clark, composed of said J. H. W. Culliford and John S. Clark, defendants herein, was really the managing agent of said owner, yet the fact is, as shown by the evidence, that the said Culliford & Clark held themselves out and dealt with the libelants in relation to the said "Deronda" as owners thereof, and therefore are liable on the said charter party as owners to the libelants for all damages arising from the default under said contract.

And the court does find, as conclusions of law, as follows:

391 1st. That under said charter party the defendants were bound under their guaranty to see that when the Deronda was tendered to the libelants for loading *that* she was fitted, prepared, and arranged so as to be able to carry not less than 10.000 quarters of grain under underwriters' and maritime regulations.

2d. That the said defendants were charged with full notice in law of the special objects and purposes of libelants in effecting said charter, and therefore are liable to the said libelants for the amount of damages suffered by the latter from inability to sell and deliver under the grain contract with Forestier & Co.

3d. That the amount of such damages was the sum of $23,993.76 dollars.

4th. That libelants should have judgment for that amount, with legal interest from June 30th, 1883, against the defendants and against the sureties on the release bond in attachment.

Considering the aforesaid findings of fact and law, and the same being in favor of libelants and against defendants, it is ordered, adjudged, and decreed that the libelants, A. J. Gomila and Larned Torrey, composing the firm of Gomila & Co., do recover from the respondents, J. H. W. Culliford and John S. Clark, composing the firm of Culliford & Clark, the sum of twenty-three thousand nine hundred and ninety-three dollars and seventy-six cents ($23,993.76) damages, with 5 % interest from 30th June, 1883, till paid, and costs of suit.

And whereas the steamship Deronda, the property of the respondents, had been seized under the writ of attachment issued in the cause, but said seizure was released and the vessel restored to the owners on giving bond and security according to the law—

It is further adjudged and decreed that J. H. W. Culliford and Jno. S. Clark, copartners under the firm name of Culliford

392 & Clark, owners of said steamship, as principals on the release bond (by G. H. Eldridge, master, and their lawful bailee), and Thos. D. Miller and Emile L. Carriere, of New Orleans, as sureties on said release bond, be condemned *in solido* to pay the foregoing judgment, interest, and costs.

Judgment rendered February 28th, '85.

(Signed) DON A. PARDEE, *Judge.*

By the court in explanation:

In the foregoing findings of fact I have kept in view the issues made by the parties only, which are:

1st. Ownership of Deronda.

2d. Transfer of charter.

3d. Compliance with guaranty.

On these points I have found the facts fully, perhaps more in detail than necessary.

As the pleadings present no issue of stevedore's charges or bad stowage, I have made no findings on those points; besides, by the terms of the contract, charterers were not to be responsible for storage.

I have also omitted certain requested findings. As to what does not appear in the findings is presumed not to have appeared in the evidence.

The findings show how far I have considered letters and telegrams passing between defendants and their New Orleans agents.

All evidence of negotiations and declarations of the parties prior to the execution of the charter were admissible to show that the defendants had notice of the special inducements of the libellants to enter into the contract; and evidence of the con-
393 duct and declaration of the parties subsequent to the breach was admissible to show what each did to save himself and others from damages, and so far as I have admitted the letters and telegrams passing between defendants and their agents.

As to the law of the case I agree with the district judge, as I have on the facts, except as to the *quantum* of damages.

On this it seems to me that under the circumstances, where the cargo was liable to spoil and where the defendants would do nothing and the libellants' title not only denied, but they could not be sure of making delivery, the libellants, even if they were financially able, were not bound to attempt to carry the cargo. A sale at auction, where all parties could protect their interests, was fair to all concerned. If at that sale the price was lower than a clear cargo, certain of delivery, would have brought, it is attributable to the conduct of defendants, who did nothing to protect themselves and embarrassed the libellants in trying to straighten out complications.

Rule for New Trial.

Extract from the Minutes, November Term, 1884.

NEW ORLEANS, SATURDAY, *February* 28, 1885.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circ. J.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

This cause came on to be heard on the rule of the claimants for a new trial herein, and after argument by proctors for the respective

parties the matter was submitted, when the court took time to advise.

Submission.

Extract from the Minutes, November Term, 1884.

NEW ORLEANS, SATURDAY, *March 14th*, 1885.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, cir. J.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

This cause came on to be heard on the rule of the claimants for a new trial herein and was argued by proctors.

Whereupon and on consideration thereof it is ordered and decreed that the rehearing be, and the same is hereby, refused.

394 *Defendants' Bill of Exceptions No.* 1. *Filed March 21st*, 1885.

United States Circuit Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

Be it remembered that upon the trial of the above-entitled cause, the court having entered and filed certain findings of fact on the 28th February, 1885, defendants at the time requested the court to make the following findings of fact, as being material to the determination of their cause, upon which evidence had been adduced and received without objection, and that the same had been conclusively shown by uncontradicted testimony and were material and ultimate facts, on which the correct determination of the cause depended; and thereupon the findings so requested by defendants *and* pointed out and stated distinctly and specifically as follows, to wit:

1. That Gomila & Co. charged and collected the following bill for loading said steamship, to wit:

NEW ORLEANS, *June 30th*, 1883.

S. S. Deronda to Relief Elevator No. —, Dr.

For loading 67,001 1/8 bus. bulk corn, at 1.75 per cwt.	$117 25
For sacking & sewing 15,586 1/8 bus. in sacks, 1 1/2 per bus.	223 79
For stowing 5,785 sacks, at 3 ct. per sack	173 55
	$524 59

Gomila & Co. paid their employees, Alfred & Neeb, the following bill for loading said steamship, to wit:

395

NEW ORLEANS, *June* 30, 1883.

Messrs. Gomila & Co. to A. — Neeb, Dr.

S. S. Deronda:

To trimming 67,001 bus. corn, trimming, $1.25	$83 75
To sacking and sewing 15,586, at ¾	116 88
To stowing 5,785 sacks, at 2 ct.	130 16
To extra labor, night work	21 30
	$352 09

2. Alfred & Neeb were not regular stevedores. Alfred was a clerk in the employ of Gomila & Co. and, as such, had charge of their grain elevator belonging to Gomila & Co., operated by their employees, and used by them in loading the steamship. Alfred had been since April, 1883, superintendent and weighmaster on one of Gomila & Co.'s grain elevators. Prior to that he had been travelling for a St. Louis house and also for a New Orleans house in the stationery business. He did not call himself a practical stevedore. Neeb was not a regular stevedore, but worked in grain trimming and grain sacking. He was a grain stevedore and had been engaged in that business about fourteen years. He had also a bar-room and grocery in the city, which he kept himself and had kept for ten or twenty years past.

3. On the — day of July, 1883, the captain of the ship employed John Beattie, a regular stevedore, to break out a portion of the cargo in the between decks to get at the coal bunkers, and, in doing so, John Beattie testified that he found that cargo had not been properly stowed. Other evidence tended to show that the cargo had not been properly stowed.

396 And thereupon the court ruled that the several findings of fact as above stated were correct and true, but that while making said findings of fact, at the request of defendants' counsel, the court had disregarded the same and had given no legal effect thereto, because the pleadings presented no issue under which the said facts could be considered as legal evidence; to which ruling of the court the defendants, by counsel, excepted and tendered this bill of exceptions to the same, which is signed by the court and made part of the record.

(Signed) DON A. PARDEE, *Judge.*

Defendants' Bill of Exceptions No. 2. Filed March 21, 1885.

United States Circuit Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

Be it remembered that upon the trial of the above-entitled cause, the court having, on the 28th of February, 1885, entered and filed certain findings of fact, defendants at the time objected specifically to certain of these facts thus found and to portions or parts thereof upon the ground that there was no evidence to support the same, and that no evidence whatever had been introduced to prove
397 the same and no issue made by the pleadings under which the same were admissible or under which effect could legally be given to the same, the record and evidence being referred to in this connection as part of this bill of exceptions; and thereupon the said findings and portions of findings so objected to in the said several findings of fact were there pointed out specifically and distinctly as follows, to wit:

In finding No. three, that no cable message was ever prepared or sent, as is therein erroneously stated, "in which the captain said the vessel will carry 10,000 quarters of grain if we may coal at Halifax." Only one cable message was sent on the 18th of June to the owners, to wit, the message of that date *is* recited in full in the finding, and that message was made up by the master & De Wolf from Gomila's code book, in Gomila's office and with his assistance.

In finding No. six, in saying "the ship was declared by the underwriters' inspector to be full all over," * * * "and the inspector gave his certificate to that effect."

In finding No. eight, in saying "all parties had notice at once."

In finding No. twelve, in saying "a large quantity of coal and water." The whole of the findings Nos. fifteen and sixteen.

Finding No. seventeen, like No. fifteen and sixteen, *are* really conclusions of law, and therefore inoperative as findings of fact.

But the court, after due consideration and being satisfied that the evidence in the record specifically sustains each and every of the findings of fact in the matters in which objection is made,
398 overruled the said objection so made to the findings and parts of findings severally as aforesaid, and thereupon the said defendants excepted to the ruling of the court at the time, and tendered this their bill of exceptions to the said rulings, which is signed by the court and made part of the record accordingly, the court, not feeling at liberty to refuse the defendants the right to attach the entire record, considering that this opinion of the Supreme Court in the case of Francis Wright, 105 U. S., p. 387, gives such right in a bill like this.

(Signed) DON A. PARDEE, *Judge.*

Defendants' Bill of Exceptions No. 3. *Filed March* 21, 1885.

United States Circuit Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

Be it remembered that upon the trial of the above-entitled cause the court having entered and filed certain findings of fact on the 28th day of February, 1885, defendants at the time requested the court to make the following findings of fact as being material to the determination of the cause, alleging that evidence had been adduced and received without objection, and that the same had been conclusively shown by uncontradicted testimony, and were material and ultimate facts, on which the correct determination of the cause
399 depended (the record and all the testimony and evidence being referred to in this connection as part of this bill of exceptions), and thereupon the findings so requested by defendants were pointed out and stated distinctly and specifically as follows, to wit:

1. On the 19th of June, when the contract of charter party was signed, Gomila knew that the following telegrams and no others had passed between the parties during the negotiations which preceded the signing of the contract, to wit:

NEW ORLEANS, *June 16th*, 1883.

To W. J. Hammond, Liverpool:

"Deronda." Are offered 5–6, Copenhagen, Aarhuns, calling at Elsinore for orders. She must be guaranteed to carry not less than 10,000 quarters, charterers to have power of cancelling charter party if vessel is not ready to load cargo by 25th June.

(Signed) DE WOLF & HAMMOND.

LIVERPOOL, *June* 18, 1883.

Fix "Deronda." 5–6, Aarhuns; guarantee 10,000 quarters, provided captain agrees quantity; lighterage at charterers' risk & expense. Try 5–9.

(Signed) W. J. HAMMOND.

NEW ORLEANS, *June* 18, 1883.

To W. J. Hammond, Liverpool. (Deronda.)

Captain's opinion she can carry 10,000 quarters, coaling Sydney; have closed as follows, subject to owner's approval: 5–9, calling at Elsinore for orders Copenhagen, Aarhuns, charterers' option call at Falmouth for orders, 5–3, to discharge at a safe port in U. K. or Continent, Bordeaux or Hamburg. If ordered to U. K. direct, 3*d.* off. If ordered to Continent from port of call, 10 per cent additional.

(Signed) DE WOLF & HAMMOND.

400 LIVERPOOL, *June* 19, 1883.

Fix Deronda. After hard work got Culliford, owners accept your offer, but you must exclude Rouen; cannot go there.

(Signed) W. J. HAMMOND.

The said telegrams thus sent to the owners were made up with the assistance of Mr. Gomila, as being the proper and necessary telegrams to be sent to the owners.

2. Gomila & Co. had named June 25th as the cancelling date, but the captain of the ship objected to this, because he said he had his inward cargo to get out and could not get the ship ready by that date.

3. There was no tender of the steamer for loading at any time prior to the 30th of June.

4. There was no tender of the steamer to the charterers on the 30th day of June, as being fully loaded, and no statement or admission was then made to the charterers by the owners, or by any one authorized to represent them, that the steamer either could not or would not carry the full quantity of grain guaranteed by the terms of the charter party.

5. The lay days, under the terms of the charter party, commenced on the 30th of June, because the certificate of the surveyor of grain that the ship was ready to receive cargo was not given until the 29th day of June.

6. Stekkebrye & Hiralsoe, of Copenhagen, were the parties to whom Forestier & Co. had engaged to ship the grain originally. The same cargo as finally taken was sold and shipped by Forestier & Co. to and received by the said Stekkebrye & Hiralsoe at the price of $50,067.65.

401 But the court refused to make the foregoing findings as requested upon the grounds following, to wit:

1. Because application to find them comes after the finding of facts entered by the court, and the matters referred to are not embraced in the original findings, as requested by the defendants.

2. Because, so far as the requested matters are facts and are material to the issues between the parties, they are included in the facts already found.

3. Because the matters referred to are not shown by counsel to be material to the issues between the parties, but are merely so alleged.

4. Because No. 1 is not supported by the evidence in the case, there being no evidence to show what Gomila did not know, nor that Gomila gave assistance in making up all the dispatches referred to.

5. Because No. 2 is wholly irrelevant.

6. Because Nos. 3 & 4 are conclusions of law, and, if correct at all, are to be drawn from the facts as already sufficiently found.

7. Because No. 5 is a conclusion of law based on a certificate not found in the transcript nor produced by the court, if it ever had any existence.

8. Because as to No. 6 the requested finding is not clear under the evidence, there being evidence to show that the price paid by Stekkebrye & Hiralsoe to Forestier & Co. for the cargo finally delivered was some $7,500 less than the price named, and the court is unable to say from the evidence what the real price was; to which refusal and ruling of the court the defendants excepted and tendered this
402 bill of exceptions, which is signed by the judge and made part of the record.

(Signed) DON A. PARDEE, *Judge.*

United States Circuit Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

Be it remembered that upon the trial of the above-entitled cause, the court having, on the 28th day of February, 1885, entired and filed certain findings of fact, conclusions of law, and an opinion in writing "in explanation," respondents at the time objected and excepted to the said conclusions of law on the ground that the said conclusions of law — severally *and* unsupported by the evidence and contrary thereto and to the law; and respondents also at the same time objected and excepted to the said opinion "in explanation," and filing of the same in the record, on the grounds above stated, as having been made to the conclusions of law, and on the further ground that the said opinion was not either a finding of facts nor a conclusion of law, either in whole or in part, and therefore should not be filed in or be considered as part of the record.

The court, after considering, overruled the said objections, and to the ruling of the court in the premises the defendants excepted at the time and tendered this their bill of exceptions, which
403 is allowed by the court and signed accordingly.

(Signed) DON A. PARDEE, *Judge.*

Defendants' Bill of Exceptions No. 5. *Filed March* 21*st*, 1885.

United States Circuit Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

Be it remembered that upon the trial of the above-entitled cause, the court having entered and filed certain findings of fact on the 28th day of February, 1885, defendants at the time requested the court to make the following findings of fact as being material to the determination of the cause, upon which evidence had been adduced and received without objection, and that the same had been conclusively shown by uncontradicted testimony and were material and

ultimate facts, on which the correct determination of the cause depended, and thereupon the findings so requested by defendants were pointed out and stated distinctly and specifically as follows:

1. On the 5th of July, 1883, E. Forestier & Co. wrote and served on De Wolf & Hammond the following letter:

NEW ORLEANS, *July 5th*, 1883.

Messrs. De Wolf & Hammond, agents S. S. Deronda.

404 GENTLEMEN: We confirm our letter of this morning. Upon visiting the Deronda this evening, about 4 p. m., in company with Captain Baker and Mr. Torrey, we were surprised to see that the mate and crew and a stevedore employed by the officers of the vessel were illegally and improperly shifting the cargo and bulking it between decks, contrary to the rules of the underwriters and customs of the port and directly against the orders and directions of the marine inspectors.

We most emphatically protest and warn you, as the agents of the owners, against this and all other illegal and improper action concerning said cargo. Heavy damages have already arisen in this matter and are hourly increasing, for which we look to and will hold the said vessel and her owners.

2. When the loading was begun, on the 28th of June, the steamship had on board 205 tons of coal as fuel. Subsequently 71 tons of the coal was taken out, leaving only 140 tons of coal for fuel on board when she left port.

And thereupon the court ruled as follows:

The said requested findings are refused, because—

1. They were not requested in the original requests made by the defendants, nor until after the formal finding of facts had been entered.

2. Counsel has not pointed out how the said alleged facts are material to any issue between the parties.

3. They are not deemed material to any issue between the parties; but if they are material, they are only incidentally so, being isolated pieces of evidence, calculated, by being separately
405 found, to mislead, unless the other incidental facts tending to the establishment of the same ultimate fact or issue should also be elaborately found.

4. The matters referred to are sufficiently embraced in the findings of fact already entered, if the facts and not the evidence are to go in the record.

To which ruling of the court the counsel for defendants excepted and tendered this bill of exceptions, which is signed and made part of the record accordingly.

(Signed) DON A. PARDEE, *Judge.*

406 *Motion for Appeal. Entered and Filed March 23rd, 1885.*

United States Circuit Court, Eastern District of Louisiana.

GOMILA & Co.
vs.
CULLIFORD & CLARK. } No. 10669.

On motion of J. McConnell, J. R. Beckwith, & H. E. Upton, proctors for Culliford & Clark, and J. H. W. Culliford and John S. Clark, composing the said firm, claimants herein, by George Henry Eldridge, master of said ship, and of Thomas D. Miller and Emile L. Carriere, sureties, all defendants herein, and on suggesting to the court that by a final judgment herein rendered on the 28th day of February, 1885, and signed on the 14th of March, 1885, said defendants have been condemned, jointly and severally, to pay to libellants the sum of twenty-three thousand nine hundred and ninety-three $\frac{76}{100}$ dollars ($25,993.76), with five per cent. interest thereon from June 30th, 1883, until paid, and costs; and on further suggesting that said defendants are advised and believe that there is error to their prejudice in said judgment and in the findings of fact and conclusions of law, and that they are aggrieved thereby, and tha tthey desire to appeal suspensively therefrom to the Supreme Court of the United States—

It is now ordered by the court that an appeal, to operate as a supersedeas, be allowed the said defendants and movers herein, returnable to the Supreme Court of the United States at the next term thereof, to wit, on the second Monday of October, 1885, upon
407 the said appellants furnishing bond, with good and solvent security, in the sum of thirty-two thousand dollars, conditioned as the law directs, to be approved by the court.

(Signed) DON A. PARDEE, *Judge.*

Am't of bond accepted.

(Signed) J. WARD GURLEY, JR.,
For Proctors for Libellants.

Bond for Appeal. Filed March 28, 1885.

UNITED STATES OF AMERICA:

Know all men by these presents that we, J. H. W. Culliford and John S. Clark, composing the firm of Culliford and Clark, and Thomas D. Miller and Emile Carriere, as principals, and T. D. Miller and H. D. Forsyth, as sureties, are held and firmly bound, jointly and severally, unto A. J. Gomila and Larned Torrey, composing the firm of Gomila & Co., in the sum of thirty-two thousand dollars, lawful money of the United States of America, to be paid to the said A. J. Gomila and Larned Torrey, composing said firm of Gomila & Co., their heirs, executors, administrators, and assigns; for which

payment, well and truly to be made, we bind ourselves and each of us, by himself and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 27th day of March, 1885, in the year of our Lord eighteen hundred and eighty-five.

Whereas the said appellants, J. H. W. Culliford & John S. Clark, composing the firm of Culliford & Clark, and Thomas D.
408 Miller and Emile L. Carriere, having heretofore, to wit, on the 23rd day of March, 1885, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 28th day of February, 1885, and signed on the fourteenth day of March, 1885, by the circuit court of the United States for the fifth circuit and eastern district of Louisiana, holding session in and for the district of Louisiana, in the suit of Gomila & Co. *vs.* Culliford & Clark, No. 10669 of the docket thereof:

Now, the condition of the above obligation is that if the above-bounden appellants shall prosecute their said appeal to effect and shall answer all damages and costs if they shall fail to make good their appeal, then this obligation shall be void; otherwise to remain in full force and virtue.

CULLIFORD & CLARK,
J. H. CULLIFORD,
JOHN S. CLARK,
EMILE L. CARRIERE, &
THOS. D. MILLER,
By their proctor, J. McCONNELL.
T. D. MILLER.
H. D. FORSYTH.

Signed, sealed, and delivered in the presence of—

—— ——.

Accepted.
(Signed) DON A. PARDEE, *Judge.*

Approved.

ROUSE & GRANT,
Per G.
J. WARD GURLEY, JR.,
Proctors for Libellants.

409 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 408 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of Gomila & Co. *vs.* Culliford & Clark, No. 10669 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 22 day of July, A. D. 1885.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, *Clerk.*

I, Don A. Pardee, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana was, at the time of signing said certificate and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 22 day of July, A. D. 1885.

DON A. PARDEE, *Judge.*

Endorsed on cover: E. Louisiana C. C. U. S. No. 290. J. H. W. Culliford and John S. Clark, copartners as Culliford & Clark, *et al.*, appellants, *vs.* A. J. Gomila & Larned Torrey, composing the firm of Gomila & Company. Filed September 14, 1885.

Office Supreme Court U. S.
FILED.
SEP 24 1888
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States

No. 33.

CULLIFORD & CLARK

versus

A. J. GOMILA & CO.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Brief of J. R. BECKWITH,
Counsel for Appellants.

A. W. Hyatt, Stationer and Printer, 73 Camp Street, New Orleans—42742.

SUPREME COURT OF THE UNITED STATES.

No. 33.

CULLIFORD & CLARK

vs.

A. J. GOMILA & CO.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

This case illustrates well some of the objectional features of the present system of review in admiralty causes, and the reason why there is general protest against the system by the entire bar of the country.

The statute does not in effect grant an "appeal," as that term is understood in law, and is more limited in range of review than a writ of error in a common law cause. The course of the circuit judge, as illustrated by the findings of fact and the bills of exceptions in the records, shows the impossibility of ever getting the real case here for review unless the circuit judge is willing.

We respectfully insist that there can be no question that the decree in this cause is wrong and ought not to have been the result of the contention.

The question is, under the law regulating review in this class of cases, can the error be corrected?

The circuit judge, by a very general finding of facts, where he has attempted to find fact, and by arbitrary refusal to find when specially requested to find, has so shaped the case that it is impossible to ascertain what kind of law he invoked, and how he made its application to the case or even to the facts as he found or refused to find them.

The facts are, that A. J. Gomila & Co., grain and charter-party speculators, a firm of which this court has some knowledge, allege that on the 7th of June, 1883, they entered into a grain contract with E. Forestier & Co., also of New Orleans, in which they agreed to sell Forestier & Co. a cargo of corn, No. 2, New Orleans inspection, the cargo to be on board seller's vessel not later than midnight of the 30th of June, 1883; cargo to be not over $12,000, nor under 10,000 quarters of 480 pounds: destination, Elsinore, for orders to Copenhagen or Aarhous; freight, six shillings; any difference of freight to be on account of Gomila & Co.; terms, cash on delivery of documents.

This enterprise was a characteristic exploit of Gomila as a grain speculator. At the time of the contract, June 7th, there was no vessel in port that he could get to take any such cargo. He took the chances: if none arrived the firm must make default and settle damages with Forestier & Co. It was not until the 18th of June that the arrival of the Deronda at New Orleans from the Mediterranean, with a general cargo to be discharged, gave Gomila a chance to fill his contract with the New Orleans buyers; it was indispensable that Gomila & Co. should have the vessel to save default, the market was declining. The vessel was of about 1090 tons, English measurement, propelled by steam. Negotiation was at once opened to get the vessel for the grain cargo. The first question to be determined was, whether the the Deronda would carry 10,000 quarters. On the 18th June, DeWolf, the agent of the vessel, Eldridge, the master, and Gomila met in consultation on the question; they had before them a plan of the ship, and all of them, Gomila included,

arrived at the conclusion that the vessel would carry 10,000 quarters, if permitted to coal on the voyage. It was Gomila's interest that this conclusion should be reached, otherwise he had no alternative but default in his contract.

A cablegram was made up by the parties to the consultation from Gomila's code book to that effect, and sent to the agents of the ship in England. To this cable the agents answered, directing the charter of the ship if the master thought she could carry 10,000 quarters. A charter-party was entered to Gomila & Co., as charterers, on the 18th of June (the next day).

This charter-party is made an exhibit and part of the libel (Rec. 7), describing the vessel as of 1090 net register, classed 100 A 1, tight, etc.; that she shall proceed with all convenient speed to New Orleans and load as customary "a full and complete cargo of wheat and (or) maize and (or) rye in bulk and (or) ship's sacks as customary." The cargo to be brought to and taken from alongside the vessel at merchant's risk; cargo not to exceed what the vessel could reasonably carry over and above her tackle, apparel, fuel, provision and furniture. and proceed under steam to a safe port in the United Kingdom or on the continent between Bordeaux and Hamburg, excluding Rouen, calling atQueenstown or Falmouth for orders. The rate of freight per quarter is fixed; also stipulation relative to lay days, port charges, etc., and a guarantee that the vessel shall carry not less than 10,000 quarters of 480 pounds. The steamer is given liberty to coal *en route*.

"Stevedore for loading said steamer to be *appointed by char.*
"*terers*, under captain's directions, at current rates for such
"labor. Charterers not to be held responsible for improper
"stowage."

Sixteen lay days, Sundays excepted, are allowed for loading and discharging; demurrage at six pence gross ton register. There was no cancelling or forfeiting date, nor was time as to the date when the vessel should be ready to take in cargo made

the essence of the charter-party contract as written and accepted by both parties. If time ever became an essential element in the contract, it was by reason of matters not carried into the contract as written. It seems incredible that the agents of the ship should have contemplated loading a ship just arrived in port and not unloaded, on time conditions of the description now claimed for this charter party.

Some time on the 28th of June the cargo brought in by the Deronda was discharged and loading the grain cargo commenced at once. On that day, or at the latest on the 29th of June, and before all of the cargo was on board, Gomila & Co. delivered their charter-party contract and the copy held by them over to the purchasers, Forestier & Co., of New Orleans, together with all other documents relating to the cargo, apparently in order to put the purchasers in a position to draw exchange with the documents as collateral.

On the day of the delivery of the charter-party and other documents, and while the vessel was still loading, Forestier & Co. took the Gomila & Co. charter-party to De-Wolf & Hammond, ship's agents, and either as a matter of personal vanity desiring to appear as charterers themselves, or more likely to take the name of Gomila, who had an unpleasant notoriety amongst grain speculators abroad, out of the record, so that he should not appear in the deal, surrendered to DeWolf & Hammond the only charter-party copy issued to Gomila & Co., and on representation that they were the owners of the cargo, asked the ship's agents to cancel the Gomila charter-party and issue one in its place to them (Forestier & Co.). This was acceded to by the ship's agents, and on the 29th June the Gomila charter was canceled and a new charter-party on the same terms made between the ship and *Forestier & Co., both parties* signing the new contract. It was under this *last charter-party* that the cargo was ultimately carried and delivered in

Europe. The ship in all things fulfilled this charter-party to *Forestier & Co.* as appellants claim, without any breach of the contract.

The loading was at that time going on from the barges, Gomila's floating grain elevator being used. The charter-party gave the charterers the right to appoint the stevedore in the terms as above given in full copy from the contract. This covenant is in a measure obscure in meaning when considered apart from the custom of the port in that particular, but most undoubtedly is a covenant that the loading shall be under the charge of a person experienced in loading ships with grain. The loading being effected by steam machinery, and to be in bulk and sacks. The master of the vessel could have no direction or control of detail or process while the grain was being sent into the ship by steam machinery under the control of the adverse party actually putting the cargo on board. The ship was to pay the stevedore the usual price in the port. This stipulation of course meant that the charterers would furnish a competent man, and that the ship would pay the wages for competent skill.

The fact is that Gomila never appointed a *stevedore*, but entered into a dishonest device to stow the ship himself and charge the ship a bogus bill for a stevedore.

Gomila had as employees on the grain elevator two persons, one named Alfred, another named Neeb. Alfred was a clerk of Gomila and had been some few weeks a *weighmaster* on the Gomila elevator; prior to that he had been a *drummer for a New Orleans house dealing in stationery*, where he acquired all the knowledge of stowing ships possessed by him. Neeb kept a rum mill presided over by himself for ten or twenty years past. If he had any other occupation or trade it was trimming or sacking grain, which seems to have been a secondary, transient occupation. Why these men were employed instead of a

skilled stevedore or at least one reason appears in an act of deliberate fraud perpetrated by Gomila in connection with this clause of the charter-party. Gomila has charged and collected from the ship as money *paid to stevedore* $524 59, when in fact if he paid anything more than the current wages of his employees he did not pay b[illegible] $352 09. The demand made on and paid by the ship was fraudulent to the extent at least of the difference between the $350 09, the most Gomila & Co pretended to have paid, and the $524 59 collected from the ship under the stevedore clause in the charter-party. This all appears in Bill of Exception No. 1 (record, 228). The fact that there *was no stevedore* appointed by the charterer in the sense and import of the stevedore clause in the charter-party we insist appears by the record and by the finding of facts and bills of exception.

As was to be expected from this scheme and the employment of such inexperienced men the cargo was badly stowed, and about 2 o'clock P. M. of the 30th June, the cargo space in the ship was full, and only 9635 quarters on board, 365 quarters short of 10,000, and the ship by the underwriter inspector declared full; at this time the only charter-party out was to *Forestier & Co., a charter* issued on the surrender of the Gomila charter.

That the ship if properly loaded and stowed would have taken the 10,000 quarters on board is evidenced by the fact that she had taken and carried 10,000 quarters on a former voyage, and when restowed by a competent stevedore, she fulfilled this very charter-party and carried and delivered more that 10,000 quarters *for Forestier & Co. the charterers*, under the charter-party of June 29th.

But the market rate of corn of this class was declining and the parties interested would not have been deemed fit for the fraternity of grain gamblers if they were not ready to scheme to throw the loss on the ship. Gomila's bad stowage was made the basis of a scheme to effect this end.

On the 5th of July, *Forestier & Co.*, although they had taken care to have the Gomila charter-party cancelled, and were the charterers themselves in their own name, addressed Gomila & Co. a note declining to accept the cargo under their own *charter-party*, by reason of a deficiency of quantity on board and demanded a check for their loss (record, 26). All parties had now agreed upon their scheme to mulct the ship, Gomila & Co. are complaisant, do not set up the objection that Forestier & Co. having taken the charter-party themselves and having by their direction procured the cancellation of the Gomila charter-party, took the risk of the cargo and were not in a position to declare the contract off, pretended to take back the corn and sent their check to Forestier & Co. for $3,194 29, which it seems, from the findings of the court, was for *commissions lost* by Forestier & Co., but was accepted as settlement of *all loss*, at least as it appears.

The situation of affairs, then, was cargo on board the Deronda under charter to *Forestier & Co.* If the compromise transaction between Gomila & Co. and Forestier & Co. could be made without the consent of the ship which was really a matter of much doubt, the cargo belonged again to Gomila & Co. subject to such rights in the cargo as had been acquired by the ship, from the fact that it had been taken on the ship under the Forestier charter-party. If that charter-party was good the ship had the right to carry the cargo and hold it for the freight money until paid. The master had taken steps to have the cargo restowed and take on the balance of the 10,000 quarters.

After the arrangement of the 5th of July, when Forestier & Co. and Gomila & Co. had, as it is alleged, settled between themselves, Gomila & Co. at once became active. They put the cargo into the hands of a city auctioneer for sale at auction, after a short advertisement in the local newspapers; the "*proces verbal*" of the sale is filed with the libel and is found on page 5 of the record. If, as the auctioneer says, he inserted the advertisement of the sale *five*

times, the scheme must have been invented before *Forestier & Co.* declared the contract off on the 5th of July. By the auctioneer's returns, attached to the libel, it appears that the sale took place at the head of Washington street, far away from any business portion of the city, at 10 o'clock, A. M., of the *7th day of July*. The auctioneer says the sale was made at the order of Gomila & Co. "*for account of whom it may concern.*" The court in its findings (10th finding, record, 224) declares that the sale was "*at shipper's risk*," whatever that may mean. The certificate of the auctioneer attached to the libel, as a part of the record, is doubtless conclusive against the libellant concerning the representation made by the auctioneer at the instance of Gomila & Co. At the time of the sale, he says, "that he offered for sale the cargo of 82,588 bushels *of corn*, of inspected No. 2 mixed corn, said grade then on board the English steamship Deronda," and then read the following announcement :

"Cargo described in the advertisement was loaded under charter-party just read," (there was no charter-parties out than the *Forestier & Co.'s charter*), "in which it is guaranteed the steamer can carry not less than 10,000 quarters of 480 lbs. each, but that when the amount named in the advertisement, viz., 82,588 bushels, was on board, the parties loading were stopped by order of the marine inspector, and the ship pronounced full all over. The inability of the ship to carry stipulated 10,000 quarters, in the opinion of the charterers, broke the charter-party, as it did in fact their contract of sale, and was a failure on the part of the owners to comply with the terms of the charter.

All negotiations for the adjustment of the matters involved having failed, this sale has been determined upon as best for the interests of all concerned.

The purchaser will buy the cargo just as it now is on board, together with the privilege of the charter-party just read, and only such rights as he may acquire thereunder without recourse."

If any charter-party was read as recited, it was the *Forestier* charter.

That the literature of this proclamation came from the brain of Gomila, none who knew him can doubt. It was a part of a scheme to swell his apparent loss.

He proposed to sell a lawsuit, a dispute, which, for the purpose of lessening the price to be offered, he declared was a controversy *not to be settled by negotiation.* The grain was in such custody that there could be no delivery by Gomila or the auctioneer. It was the cargo of a vessel that had acquired some right in the grain, at least the right of custody for freight under a charter-party, to which Gomila & Co. were not parties, if it should turn out that the charter-party was not "broken," if the charter-party was "broken" and off the ship was not compelled to carry the cargo under its terms, but could discharge in New Orleans. A contention of serious proportion affected all there was for sale by the auctioneer. The ship claimed that the charter-party did not limit loading to June; that the cargo was being restowed and some of the coal bunkers had been discharged or were being discharged. That the ship was ready and willing to perform the charter-party, and that the charterers were at fault. Who was the actual charterer was uncertain if Gomila was to be believed. Yet this sale so made was by the circuit court taken as establishing the value of the grain in the market on the 7th of July, 1883. As Gomila expected, the cargo sold for a small portion of the value of the same amount of grain in warehouse, free from lawsuits or complication. *A. Carriere & Sons* were the nominal purchasers for $29,622 84. They are said to have sold to J. B. Camors & Co. for $———, at what price does not appear. Camors & Co. are said to have sold to *Forestier & Co.* for $40,422 00, so that before the 13th of July the result of this scheming was that the cargo was back in the hands of the charterers, *Forestier & Co.* The respondents always insisted that all of these pretended transfers were sham and tricks to swell damage if possible.

No sooner had Gomila & Co. effected this pretended auction sale than they set about embarrassing the ship; on the same day of the auction, July 7th, they filed the libel in this case, praying the attachment of the ship in an action for the differ-

ence between 60⅛ cents per bushel and the price at which the cargo was sold at the auction, and obtained by wire from New Haven an order for attachment; on the 9th, attachment issued on this telegraphic order; on the same day the United States Marshal attached the Deronda and took her from the custody of the owners.

It was not until the 12th of July that the master was able to secure bond for the release of the vessel and regain possession of the ship, Gomila & Co. by their process, keeping the ship from owners' custody three days. As soon as the vessel was back in the custody of the master, he demanded the balance of the 10,000 quarters; it was taken on board the vessel; the court thinks the grain came from J. B. Camors & Co., but beyond a doubt it came from Gomila & Co. On the 18th of July, the ship sailed under the *Forestier & Co. charter party*, fulfilled the contract and delivered the grain on the continent according to the terms of the charter-party and bills of lading.

Against this auction sale of the 7th of July, the agents of the ship and master made public protest and extension before a notary on the 7th of July (record, page 48), long after the attachment was issued and after the vessel had been taken into custody, *viz.:* on the 12th of July, Gomila & Co. made formal protest against the change of the charter from *Gomila & Co. to Forestier & Co.* on the 28th or 29th of June (record, 23).

STATEMENT OF PLEADINGS AND RECORD.

The libel was filed July 7th, 1883. A telegram order for process was made the same day. The clerk does not seem to have acted on the telegram until the 9th of July, when process was issued and the ship seized.

The libel is in the usual form of libel on charter-party; alleges that Culliford & Clark, of Sunderland, England, are the

owners of the Deronda; that the vessel was chartered to libellants on the 19th of June, 1883, setting out the charter-party in terms substantially as we have set it out; that the vessel was under guarantee to take 10,000 quarters of 480 lbs.; gives the destination of the vessel, but states no limit of time within which the cargo was to be taken on board, nothing of any agreement in the charter to load in June, or that time was in any particular the essence of any part of the contract; states that the vessel did not have 10,000 quarters on board when she was pronounced full on the 30th of June, that therefore, there was an utter failure of contract and guarantee; that as a consequence of this alleged failure, Gomila & Co. were unable to carry out some contract for the sale of 10,000 quarters of corn; what the details of this contract are or with whom it was made, does not appear in the libel, but the contract is declared to have been a contract with special reference to which libellants had contracted for and entered into the charter-party; that they tried to sell the cargo to the respondents; the offer was refused, and "*that libellants were obliged to have said cargo sold, on account of whom it might concern*," "that being in the opinion of the libellants for the best interest of all parties;" that the cargo was so sold at auction.

"*That the libellants have in all things well and truly kept and performed all covenants and obligations on their part; that the respondents have made default.*"

That libellants' damage is $24,559 70 and "upwards," prays monition and attachment, the schedule annexed charges, as damages, the $3,194 29 said to have been paid to *Forestier & Co.* in settlement of alleged breach of contract with them, and the difference on 82,588 2-56 bushels of corn at 60¾ cents per bushel, said to have been the price at which corn was sold to *Forestier & Co.* on the 7th of June, 1883, and the proceeds of the auction sale on the 7th of July ($29,622 84), making, they say, a loss of

$20,549 39; estimate loss on 3126 bushels, not taken on board $742 42; seven days' interest on $50,172 23, $173 60, making a total demand of $24,559 70, annexed to the libel; as exhibts are the charter-party as made to Gomila & Co. with the endorsement of cancellation on the face in red ink; the *proces verbal* (required by law in Louisiana) of the auction sale of the 7th July.

On the 25th of November, the opening of the next term of the court, the defendants answered the libel. At that time the Deronda had completed her voyage and delivered her cargo. After formal matters the owner denied the truth of the 1st, 2d, 3d, 4th, 5th, 6th and 7th articles of the libel as a true statement of facts, and avers the truth to be that neither on the 19th of June, 1883, nor at any time before or since that time was the firm of Culliford & Clark the owners of the Deronda; that the vessel was the sole property of J. H. W. Culliford individually.

That the firm of Culliford & Clark were the agents of the vessel, and nothing more.

That on the 19th day of June, 1883, DeWolf & Hammond were agents of J. H. W. Culliford, the owner of the Deronda, and of the firm of Culliford & Clark; that all other matters set forth in the articles of the libel are untrue; that the truth is, that on the 19th day of June. 1883, the libellants did enter into negotiations with DeWolf & Hammond for a charter-party; that the result was the execution of a charter-party made part of the answer as exhibit "Gomila A;" that shortly after that charter-party to Gomila & Co. was executed and before any cargo was offered to the vessel, the libellants informed the agents of the vessel, DeWolf & Hammond, that their interest and obligations in the charter-party had been transferred to *Forestier & Co.*; that the contract was handed back to the agents of the ship by the transferee, *Forestier & Co.*, and in due form cancelled by the consent of parties, and a new charter-party

for the vessel for the same voyage made and delivered to *Forestier & Co. as* charterers; that the new contract is set forth by a true copy made a part of the answer, and that it was under this last charter-party that the vessel was loaded.

That the charter-party has in all things been carried out and fulfilled by the vessel, and insist that from the moment of the cancellation of the old charter-party and the execution of the new one the libellants have been no party to the contract or charter of the vessel.

That the only charter-party binding on the ship was and is the *Forestier & Co.* contract, and it is not true that it contained any obligations running to the libellants, as averred in the libel; that the real charterers, *Forestier & Co.*, have made no complaint of non-fulfillment.

That the vessel on said voyage did take on board 10,000 quarters of corn and deliverd the same at the designated port of delivery without any default.

That the libellants have sustained no loss at the hands of respondents or by their acts, and denies all of the allegations of the libel not specially traversed or confessed and avoided.

The respondents' counsel or proctors believed that this answer put at issue the averments of the libel, particularly the averment, that the libellants had in all things well and truly kept and performed all stipulations and covenants to be kept by them, and did not contribute to any of the delays or alleged wrongs complained of; they were, however, told by the circuit judge that this was not the case, and whether or not there was issue in this particular, must be considered by this court in determining the question raised by one of the bills of exception in the record.

The cause was tried in the district court. That court used the private correspondence between the agents of the ship in New

Orleans and the agents in Sunderland, England, not known to the libellants until dragged out of the New Orleans agents by judicial process long after the cause was at issue, to piece out the contract, disregarding the legal effect of the cancellation of the *Gomila charter by the act and consent of his assignees*, and rendered a decree against the respondents for $9,360 97, with interest from the 30th of June, 1883. Both parties appealed from the decree to the circuit court; additional proofs were taken in the circuit court and the case went to trial on the record proofs in the district court; the additional proofs resulting in a decree against the respondents and sureties on the release bond, for twenty-three thousand nine hundred and ninety-three dollars and seventy-six cents ($23,993 76), (record, 226).

It cannot fail to excite surprise that a vessel that safely carried and safely delivered a full cargo of the quantity stipulated according to the tenor of each bill of lading and charter-party, incurred a liability expressed in the judgment of a court of record amounting, together with interest and costs, to more than twenty-four thousand dollars. The judgment is not correct, but we have to deal with the problem whether this decree has been so fortified by rules of practice relating to review that it cannot be disturbed.

There is some confusion in the record as to the findings of fact and law by the circuit judge; there is a finding printed on page 212, *et seq.*, of the printed record that was afterwards cancelled. The real finding upon which the court based its decree is printed on page 220, *et seq.*, and to avoid confusion, is, together with an "explanatory" memorandum by the court (record, 227), reprinted below in full.

The findings of fact and law and the judgment thereon heretofore entered in this case needing correction in several points, it is ordered that the same be annulled and vacated, and that the following be entered in lieu :

Appeal in Admiralty.

United States Circuit Court, Eastern District of Louisiana.

GOMILA & CO.
vs.
CULLIFORD & CLARK. } No. 10,669.

This cause came on to be heard at this term upon the pleadings and evidence and was argued, and thereupon, upon consideration of the evidence, the court finds the following as the facts in the case :

First : On the seventh day of June, 1883, Gomila & Co., who were large grain dealers in the port of New Orleans, entered into the following grain contract :

382 "Bought from Gomila & Co., by Messrs. E. Forestier & Co., at the price of (60 cts.) sixty cents per bushel of 56 lbs., on board seller's vessel, with freight at (6*s*.) six shillings per quarter, and to be shipped from New Orleans during the month of June, not later than the 30th (midnight), (seller's option), a cargo of not over 12,000 and not under 10,000 quarters (480 lbs) of No. 2 mixed corn of the standard of New Orleans inspection. Destination : Elsinore, for orders to Copenhagen or Aarhons. Any difference in freight fo account of seller ; cash on delivery of documents.

"New Orleans, June 7th, 1883.

"(Signed) GOMILA & CO."

A similar copy was made at the same time, signed "Forestier & Co."

Second : June 18th, 1883, the steamship Deronda, of which J. H. Culliford was the sole owner, though Culliford & Clark, claimants, were the apparent owners and agents in England, and of which DeWolf & Hammond were the New Orleans agents, arrived in the port of New Orleans with a cargo of salt and fruit. Her agents in New Orleans, Messrs. DeWolf & Hammond and Gomila & Co., had opened negotiations for a charter on the 16th of June. Gomila & Co., having the contract aforesaid with Forestier & Co., insisted on owner's guarantee that the Deronda would carry 10,000 quarters of 480 lbs., whereupon the following cable dispatch was sent to Hammond, of DeWolf & Hammond, who was then in Europe and in communication with claimants :

"JUNE 16TH.

"To W. J. Hammond, Liverpool:

"Deronda. Am offered 5-6, Copenhagen, Aarhons, calling at Elsinore for orders. She must be guaranteed to carry not less than 10,000 quarters; charterers to have power of cancelling charter-party if vessel is not ready to load cargo by 25th of June."

To which dispatch the following reply was sent:

"JUNE 18TH.

"Fix 'Deronda,' 5-6, Aarhons; guarantee 10,000 quarters, providing captain agrees quantity; lighterage at charterers' risk and expense. Try 5-9.

"(Signed) W. J. HAMMOND."

383 Third: On the 18th, DeWolf, agent, and the master called on Gomila & Co., and consulted as to whether the Deronda could carry 10,000 quarters of corn, the question relating more to space than to weight. At this consultation calculations were made by Mr. Gomila, of the firm of Gomila & Co., and the master as to the cargo space of the steamer, from her general plan, and her ability to carry 10,000 quarters of corn, both reaching the conclusion that the steamer would be able to carry 10,000 quarters and Gomila advised the master to so cable owners. A cable message was then made up by the master and DeWolf from Gomila's code book, in which the master said "the vessel will carry 10,000 quarters of grain if we coal at Halifax." After the said message was prepared, Gomila gave as his reasons for insisting on a guarantee the aforesaid contract with Forestier & Co., which was produced and read, and Gomila stated that he had no use for any vessel that would not carry 10,000 quarters of grain; that he must have a guarantee, and feared that if the vessel would not carry that amount the consequences would be serious; that the market had declined and was still declining and the loss would be very heavy, because the buyer would have the right to reject the cargo if the conditions were not strictly fulfilled. The same day the following cable message was sent by ship's agents:

"JUNE 18TH.

"To. W. J. Hammond. Liverpool:

"Deronda. Captain's opinion she can carry 10,000 quarters, coaling Sydney; have closed, subject to owner's approval, 5-9, calling at Elsinore for orders, Copenhagen, Aarhons, charterers' *opinion;* Cork or Falmouth for orders, 5-3, to discharge at a safe port in U. K. or continent, Bordeaux to Hamburg. If ordered to U. K. direct, 3*d.* off. If ordered to continent from port of call, 10 per cent. additional.

"(Signed) DEWOLF & HAMMOND."

To which message, on June 19th, DeWolf & Hammond
384 received the following answer;

JUNE 19TH.

"Fix Deronda. After hard work got Culliford, owners, accept your offer, but you must exclude Rouen; cannot go there.

"(Signed) W. J. HAMMOND."

Fourth: On June 19th the charter-party was entered into, of which a true copy is attached to the libel, except the endorsement in red ink across the face, and is made part of this finding.

Fifth: The cancelling date of said charter-party was not fixed because Gomila & Co. waived it, as the ship was in port and they had confidence in the ability and willingness of the master to get the ship ready in time.

Sixth: On the 28th of June the ship was ready to receive cargo, and the loading then commenced. No formal tender appears to have been made of the ship on that day, but the loading was commenced with the consent of all concerned. The loading was continued, with slight interruptions from rain, and until twenty minutes past three o'clock in the afternoon of the 30th of June, when the loading was stopped and the ship was declared by the underwriters' inspector to be full all over and ready to proceed on her voyage, and the inspector gave his certificate to that effect. She then had only 9,635 quarters on board, equivalent to 82,588⅔ bushels. [illegible] notice in the daily papers published in New Orleans, that the cargo would be sold at public auction to the highest bidder for cash, on July 7th, by one of the licensed auctioneers of the city. Against this proposed sale the agents made public protest on the [illegible]

Seventh: After the loading had begun, and before it
385 was known whether the Deronda could take the guaranteed quantity, all parties supposing that she could, Gomila & Co., as is usual in such cases, handed their copy of the charter-party to Forestier & Co. The latter, without authority from the charterers, took the copy to the ship's agent unindorsed and obtained a charter in their own name, but otherwise the same in all respects as charter to Gomila & Co., for the purpose, as they explained, of appearing to their correspondents as original parties. Gomila & Co. were advised of this by DeWolf, of DeWolf & Hammond, before the loading was finished, on June 30th, but replied to him that they would not object to such a change if the vessel fulfilled the guarantee in the charter, but that if she failed they would expect the return of the papers. On this point the court finds [illegible] Co., and enough more grain was taken aboard to make over 10,000 quarters, with which the ship sailed on the 18th of July for her original destination, and there safely arrived and delivered cargo under the substitute for charter-

Eighth: When, on the 30th of June, the steamer was loaded, as described in the sixth finding, all parties had notice at once

that the steamer could not carry the quantity guaranteed, whereupon Gomila, who was about to depart for St. Louis, left the matter in the hands of Bangston, of Forestier & Co., to arrange, instructing him substantialty as follows:

"I have no doubt this matter can be arranged with the owners, and anything you do to protect me I will be satisfied with. It seems to me the best way to arrange the matter would be to telegraph to the owners that if they will take the cargo off our hands at twenty-eight one and one-half pence, as 386 agreed upon, no one will be injured and I will be satisfied; but in case they do not do this then all that I ask is to be made whole in my contract, and you can make negotiations to that effect."

Forestier & Co. cabled their correspondence, as follows:

"Deronda. We have shipped 9,600 quarters; reply if in order or not. What do you propose? Cable at once."

And received answer, July 21, to refuse Deronda; and DeWolf & Hammond cabled claimants as follows:

"JUNE 30TH.

"To Culliford & Clark, Sunderland:

"Deronda loaded carries 9,635 quarters; cargo sold not less than 10,000 quarters. Copenhagen, 28–3; present value, 25; buyers refuse acceptance, as cargo falls short. Charterers hold owners. A cable messag[illegible]

DeWolf from Gomila's code book, in which the master said "the vessel will carry 10,000 quarters of grain if we coal at Halifax." After the said message was prepared, Gomila gave as his reasons for insisting on a guarantee the aforesaid contract with Forestier & Co., which was produced and read, and Gomila stated that he had no use for any [illegible] 10,000

"Complete swindle. Captain knows ship discharged 10,380 Bordeaux. Compromise; pay value grain.

"(Signed) CULLIFORD & CLARK."

"JULY 1ST.

"To Culliford & Clark, Sunderland:

"Cargo on board, 2,065 tons maize; 170 tons coal; surveyors refuse load deeper; ship full all over; no advantage Newport; cargo sold, June loading; shippers can sell; Copenhagen, 25s., you paying difference or owners buy cargo 28.3 cif.; best can do. Which do you advise? Cargo maize No. 2 mixed, sail grade, very good. May we draw on you for same!

"(Signed) DEWOLF & HAMMOND."

To which the following answer was made:

"JULY 4.

[illegible] ordered to U. K. direct, 3d. off. If ordered to continent from port of call, 10 per cent. additional.

"(Signed) DEWOLF & HAMMOND[illegible]

[illegible] by means paying difference value [illegible] delay."

It does not appear that charterers at the time had any knowledge of these dispatches.

387 Ninth: Negotiations were opened and continued between the parties with a view to compromise, but without result until July 5th, on which day Forestier & Co. notified Gomila & Co. that they refused the cargo because it was short, and their buyers in Copenhagen had declined to accept it. They claimed damages of Gomila & Co. for violation of the contract of sale, consisting in the loss of their commissions, amounting to $3,194 39, which Gomila & Co. paid.

Tenth: From July 3d to July 5th, Gomila & Co. telegraphed to some of the best known dealers in England and France, for quotations and offers. The best offer was twenty-three shillings, ordinary terms, or twenty-four shillings, rye terms (shippers guarantee sound condition on arrival). Libellants then decided to sell the cargo on board at the shipper's risk in the port of New Orleans, with the privilege of the charter, and so notified Messrs. DeWolf & Hammond, at the same time giving the owners the option of taking the cargo at the price to which it had been sold to Forestier & Co.

Eleventh: On the sixth day of July the ship's agents notified Gomila & Co. that they would take out coal and make room for the balance of the cargo, and that the ship would be made ready by the 7th. Gomila & Co. refused this proposal. In the meantime Gomila & Co. had given notice in the daily papers published in New Orleans, that the cargo would be sold at public auction to the highest bidder for cash, on July 7th, by one of the licensed auctioneers of the city. Against this proposed sale the agents made public protest on the part of the steamer, both on July 6th and 7th. The sale, however, took place, as advertised, and the 9,635 quarters then on board were sold for

388 $29,622 84 to A. Carriere & Sons, with privilege of the charter. A. Carriere & Sons afterwards sold the cargo, with privilege of charter, to J. B. Camors & Co., and the latter in turn resold to Forestier & Co., for the sum of $40,422 00. The charter to Gomila & Co. having been destroyed by DeWolf, they made protest for substitute, and then for want of such charter used copy of one issued to Forestier & Co. to make title.

Twelfth: On July 13th, the stowage of the Deronda having been in the meantime rearranged, and a large quantity of coal and water, the latter from the ballast tanks, having been taken out, the Deronda was again tendered to both Gomila & Co. and to Forestier & Co., demanding balance of cargo. This was furnished by J. B. Camors & Co., and enough more grain was taken aboard to make over 10,000 quarters, with which the ship sailed on the 18th of July for her original destination, and there safely arrived and delivered cargo under the substitute for charter-party provided as explained in finding 11.

Thirteenth: The cargo of the steamship Deronda was insured by E. Forestier & Co. in the New Orleans Insurance Company, according to the following memorandum filed by the clerk of said insurance company:

Memorandum.

June 30—Entered July 13. Sp. pol. 6813. S. S. Deronda, New Orleans to Elsinore, for orders to Copenhagen or Aarhons. with privilege of coaling ports, in name E. Forestier & Co., on 82,588 2/5 bushels corn (No. 2 mixed), sail grade, in bulk and ship's bags, F. F. P. A. E. C. value, $48,950, at 2 per cent. net; prem., $997 net.

389 Do. Sp. pol. 6814. Same on 82,588 2/5 bush. (No. 2 mixed) corn, sail grade, in bulk and ship's bags, F. F. P. A. E. C.; capital, 5,175, at 2 net; pr. $103 50 net.

E. Forestier & Co. never assigned these policies until they sold the exchange drawn by them against the rearranged and complete cargo (of which they, as aforesaid, became purchasers), to the Union National Bank, and then they endorsed said policies over to said bank. The testimony does not show that there was any other insurance taken out on said cargo except a reinsurance for 10,000 francs, taken by the Teutonia Insurance Company on June 28th, 1885, in favor of the New Orleans Insurance Company, which reinsurance was cancelled by the Teutonia Company when, about July 5th, the manager of the Teutonia Company learned that there was trouble about the cargo, and that the owners were going to discharge coal and water for more cargo.

Fourteenth: The carrying capacity of the Deronda for grain on voyages from New Orleans to Europe, when properly fitted out, was over 10,000 quarters, and she had on a previous voyage, with 224 tons of coal in her bunkers, safely carried a cargo of 10,253 quarters of grain, but as she was fitted out and prepared and tendered in the manner hereinbefore found to Gomila & Co. on June 28th, 1883, she could not with safety, under maritime and underwriters' rules, carry a cargo of 10,000 quarters, and she failed to receive such cargo, as hereinbefore found. By this failure the libellants lost the advantage of their said sale to Forestier & Co.

Fifteenth: Corn is a perishable article in shipping,
390 both as to time and transit, and is always at risk in voyages across the ocean, particularly if it remains in the port of New Orleans under the heat of a July sun beating on the decks, in which case the risk is increased every day it remains in port.

Sixteenth: The sale of the cargo at public auction was fairly conducted, and, under the circumstances, was necessary and proper for the protection of the rights of all parties.

Seventeenth: By the inability and failure of the steamer to receive when first tendered to Gomila & Co. a cargo of 10,000 quarters, they suffered loss, as follows:

1st.	Amount of commission paid Forestier & Co....	$3,194 29
2d.	Loss on 9,635 quarters (82,588$\frac{2}{56}$ bushels) of corn, being the difference between the price of the sale to Forestier & Co. and the sale at auction to Carriere & Sons	20,549 39
3d.	Loss on 365 quarters (3,126 bushels).....	250 08
	Making a total loss to Gomila & Co. by the failure aforesaid of twenty-three thousand nine hundred and ninety three and $\frac{76}{100}$ dollars.....	$23,993 76

Eighteenth: That although J. H. W. Culliford was the sole owner of the "Deronda," and the firm of Culliford & Clark, composed of said J. H. W. Culliford and John S. Clark, defendants herein, was really the managing agent of said owner, yet the fact is, as shown by the evidence, that the said Culliford & Clark held themselves out and dealt with the libellants in relation to the said "Deronda," as owners thereof, and therefore are liable on the said charter-party as owners to the libellants for all damages arising from the default under said contract.

And the court does find, as conclusions of law, as follows:

391 1st. That under said charter-party the defendants were bound under their guarantee to see that when the Deronda was tendered to the libellants for loading *that* she was fitted, prepared, and arranged so as to be able to carry not less than 10,000 quarters of grain under underwriters' and maritime regulations.

2d. That the said defendants were charged with full notice in law of the special objects and purposes of libellants in effecting said charter, and therefore are liable to the said libellants for the amount of damages suffered by the latter from inability to sell and deliver under the grain contract with Forestier & Co.

3d, That the amount of such damages was the sum of $23,993 76 dollars.

4th. That libellants should have judgment for that amount, with legal interest from June 30th, 1883, against the defendants and against the sureties on the release bond in attachment.

Considering the aforesaid findings of fact and law, and the same being in favor of libellants and against defendants, it is ordered, adjudged and decreed that the libellants, A. J. Gomila and Larned Torrey, composing the firm of Gomila & Co., do recover from the respondents, J. H. W. Culliford and John S. Clark, composing the firm of Culliford & Clark, the sum of twenty-three thousand nine hundred and ninety-three dollars and seventy-six cents ($23,993 76) damages, with 5 per cent. interest from 30th June, 1883, till paid, and costs of suit.

And whereas the steamship Deronda, the property of the respondents, had been seized under the writ of attachment issued in the cause, but said seizure was released and the vessel restored to the owners on giving bond and security according to the law—

It is further adjudged and decreed that J. H. W. Culliford and John S. Clark, copartners under the firm name of
392 Culliford & Clark, owners of said steamship, as principals on the release bond (by G. H. Eldridge, master, and their lawful bailee), and Thos. D. Miller and Emile L. Carriere, of New Orleans, as sureties on said release bond, be condemned *in solido* to pay the foregoing judgment, interest and costs.

Judgment rendered February 28th, '85.

(Signed) DON A. PARDEE, *Judge.*

By the court in explanation :

In the foregoing findings of fact I have kept in view the issues made by the parties only, which are :

1st. Ownership of Deronda.

2d. Transfer of charter.

3d. Compliance with guaranty.

On these points I have found the facts fully, perhaps more in detail than necessary.

As the pleadings present no issue of stevedore's charges or bad stowage, I have made no findings on those points; besides, by the terms of the contract, charterers were not to be responsible for storage.

I have also omitted certain requested findings. As to what does not appear in the findings is presumed not to have appeared in the evidence.

The findings show how far I have considered letters and telegrams passing between defendants and their New Orleans agents.

All evidence of negotiations and declarations of the parties prior to the execution of the charter were admissible to show that the defendants had notice of the special inducements of the libellants to enter into the contract; and evidence of
393 the conduct and declaration of the parties subsequent to the breach was admissible to show what each did to save himself and others from damages, and so far as I have admitted the letters and telegrams passing between defendants and their agents.

As to the law of the case I agree with the district judge, as I have on the facts, except as to the *quantum* of damages.

On this it seems to me that under the circumstances, where the cargo was liable to spoil and where the defendants would do nothing, and the libellants' title not only denied, but they could not be sure of making delivery, the libellants, even if they were financially able, were not bound to attempt to carry the cargo.

A sale at auction, where all parties could protect their interests, was fair to all concerned. If at that sale the price was lower than a clear cargo, certain of delivery, would have brought, it is attributable to the conduct of defendants, who did nothing to protect themselves, and embarrassed the libellants in trying to straighten out complications.

What efforts were made to obtain modification of findings and additional findings is apparent from the record, and resulted only in the memorandum "in explanation," and five bills of exception.

Bill of exception No. 1 is printed on page 228, *et seq.*, and in fact incorporates into the record an additional list of facts as findings of fact by the court.

FIRST.

That Gomila & Co. charged and collected from the Deronda for loading, $524 59 as stevedore charges under the stevedore stipulation in the charter-party.

SECOND.

That all Gomila & Co. really paid or expended was $352 09 to their own employees, Alfred and Neeb, making a fraudulent overcharge of $172 50.

THIRD.

That Alfred and Neeb were neither of them regular stevedores; that Alfred was a clerk of Gomila & Co., and for a short time previous had been clerk, then weighmaster on one of their floating elevators; that prior to April, 1883, the then current year, he had been a drummer for a commercial house selling stationery in St. Louis and New Orleans, and had been on the elevator as clerk only about three months, and "did not call himself a practical stevedore." That Neeb was not a regular stevedore, but worked in grain tramming and grain sacking. "He was grain stevedore and had been engaged in that business about fourteen years," (this latter sentence was injected into the bill by the judge before he would sign), "he had also, a

bar-room and grocery in the city, which he kept himself, and had kept for ten or twenty years past."

FOURTH.

"That on the — July, 1883," (the record, page 172, deposition of John Beatie, shows that this date should be prior to July 4th, 1883), "the captain of the ship employed John Beatie, a *regular stevedore*, to break out a portion of the cargo in the between decks to get at the coal bunkers, and in doing so John Beatie testified that he found that the cargo had not been properly stowed; other evidence tended to show that the cargo had not been properly stowed, and thereupon the court ruled that the several findings of fact as above set forth were true and correct."

Then follows what, considering the averment in the libel of complete performance of all of the stipulations of the charter-party by the libellants, and that libellants were in no fault, is a most extraordinary ruling or "finding of law."

"That while making said findings of fact at the request of defendants' counsel, the court has disregarded the same and given no legal effect thereto, because the pleadings presented no issue under which the said facts could be considered legal evidence." To this ruling the defendants naturally excepted.

Bills of exception Nos. 2, 3, 4 and 5 (record, 230, *et seq.*) were also taken, and will be referred to in the argument of the issue of law, and, if of no other service, illustrate well the difficulty involved in ever bringing the real case up to this court under the present system of trial and appeal, upon only so much of the case as the circuit judge is willing shall come here, and also cast some light upon the manner in which the circuit court dealt with facts and how his decree was arrived at.

ASSIGNMENT OF ERRORS.

FIRST.

The court erred in making a decree of any kind against the defendants. Upon the facts, as found by the court, the libel should have been dismissed and libellants decreed against.

SECOND.

The court erred in holding that Gomila & Co. were the charterers of the vessel after the 29th of June, 1883, when *Forestier & Co.* had accepted the documents relating to the cargo and surrendered the *Gomila & Co.* charter-party and chartered the ship themselves as found in the *seventh* finding of facts by the court, and in not holding that after that change in charterers, it was too late for *Forestier & Co.* to reject the cargo, even if it was short of 10,000 quarters on the 30th of June, 1883.

THIRD.

The court erred in finding, as matter of law, that the alleged grain contract between *Gomila & Co.* and *Forestier & Co.* was ever a part of the charter-party, or that the owner of the ship ever became directly or indirectly liable for any default in the grain contract, and that time was the essence of the charter-party.

FOURTH.

The court erred in ruling, under the facts as found by the court, that there was any default in the performance of the alleged grain contract warranting any refusal on the part of *Forestier & Co.* to accept the cargo or allowing *Gomila & Co.* and *Forestier & Co.* to agree to the revision of the grain contract to the prejudice of the owners of the ship on which the cargo was laden.

FIFTH.

The court erred in not recognizing the sale of the cargo of grain from *Gomila & Co.* to *Forestier & Co.* as a contract made within the jurisdiction of Louisiana and governed by the law of that state, both as to construction and the sufficiency of cause for refusal of vendee to accept the property sold, and in not giving effect to law of Louisiana on that subject, in force at that time, as a part of the contract.

SIXTH.

Taking and accepting the findings of fact, as made by the circuit court, particularly in the twelfth finding, as true, the

court erred in finding as a conclusion of law that the ship made default under the stipulations of either the cancelled charter-party to *Gomila & Co.*, or the subsequent charter-party to *Forestier & Co.*—"Steamer is guaranteed to carry not less than ten thousand quarters of 480 lbs."—for by that finding the ship did carry and deliver that cargo. It not being in the contract that the ship should have that cargo on board and sail in the month of June, 1883, sixteen running days, Sundays excepted, being allowed for loading and discharging, time not being the essence of the contract of the ship.

SEVENTH.

The court erred in holding as matter of law that under the stipulations common to both the cancelled and new charter-party to *Forestier & Co.*, whereby the charterers were to appoint the stevedore and stow the cargo, the owners of the ship were at fault or liable for the result of fraudulent and improper stowage by the bar tender and commercial drummer imposed on the ship by Gomila & Co., as stevedores, and in not considering and giving effect to the findings of fact set forth in defendants' bill of exception, No. 1, Rec. 228, *et seq.*

EIGHTH.

That the court having taken upon itself to depart from the exact terms of the written contract of the charter-party, and changed its construction as written, by alleged effect of extraneous circumstances alleged to surround or be connected with the execution of the written contract, every such extraneous fact so used to change the written contract was and is an "ulti. mate fact" that should come to this court, in order that this court may deal therewith (construction of contracts at all times being matter of law). The court erred in not finding facts as requested in defendants' bills of exception Nos. 2, 3 and 5, as the same are of record in the cause; and particularly for the reasons and excuses set forth in said several bills of exception, and the

grounds of refusal stated by the court in said bills of exception. The court having in no part of its findings found specially that the ship covenanted to take on board 10,000 quarters in the month of June, 1883, yet making up its decree as if such fact had been specially found from extraneous circumstances *de hors* the written contract.

NINTH.

That if the findings of fact as found, show a breach of any existing charter-party, in which Gomila & Co. were charterers, the court erred in the measure of damages awarded, and in the law governing the measure of damages in case of breach of charter-party contracts.

TENTH.

The court after finding that Forestier & Co., were the vendees in the grain purchase contract of June 7th, 1883, set out in the first finding of fact, and by implication, finding that Forester & Co., as vendees, lawfully refused to accept delivery, or carry out the sale, erred in allowing against the owner of the ship the sum of $3,194.29, "*amount of commission paid Forestier & Co.,*" as set forth in the seventeenth finding of fact, being, as appears by the finding, commission allowed to a vendee for his *own commissions* on *his own purchase,* on a contract of purchase of merchandise that, according to the finding of the circuit court, was never consummated and never affected any tradition of property so as to vest title in Forestier & Co., to whom it is alleged the commission was paid by Gomila & Co.

ELEVENTH.

The court erred in finding that the sale of the cargo at public auction, on July 7th, 1883, as found in the sixteenth finding of facts, and as shown by the *proces-verbal* of sale, made part of the libel under the circumstances under which it was made "was fairly conducted, and under the circumstances, was necessary and proper for the protection of the rights of all parties,"

and that such sale, so made and announced by the auctioneers, to be cargo on board appellants' vessel, with both the right to possession of the goods and charter of vessel in dispute, the vendors announcing charter-party broken, and not themselves, the charterers, named in the only charter-party then in existence, was a fair open sale of merchandise, from which the market value of 9635 quarters of corn in the market of New Orleans, could be fixed or ascertained as data upon which damage in this case could be computed if any damages were due.

TWELFTH.

The court erred in decreeing against appellants, $20,549.39, as damages for "loss on 9,635 quarters (82,588 2-56 bushels), of corn, being difference between price of the sale to Forestier & Co., and the sale at auction to Carriere & Sons," and also in decreeing $250.08 "loss on 3,126 bushels." The latter finding being wholly unsupported by any finding of the market value of that quantity of corn, either in New Orleans or European ports, to which the ship could be ordered under the terms of the charter-party.

THIRTEENTH.

The court erred in not dismissing the libel on the facts as found and lawful construction of the charter-party contract.

FOURTEENTH.

If the construction of the grain contract between Gomila & Co., and Forestier & Co., was, and is, the only matter of contention, and there being no contention whether the ship carried the stipulated cargo, nor concerning rate of freight for carriage and delivery, shown in the findings of facts, the case is not a case of admiralty cognizance, and should have been dismissed for that reason, even if Gomila & Co. were the charterers, in fact, at the time when the contention arose.

BRIEF OF ARGUMENT.

Gomila & Co. were not the charterers of the Deronda after the surrender of their charter-party to Forestier & Co., and after the new charter-party to *Forestier & Co.*, on the 29th of June, 1883, could not be reinstated as charterers without the consent of the owners of the Deronda, or the decree of a court of equity.

Parties to actions on charter-party contracts must be the contracting parties named in the contract.

2 Chitty on Pleadings, 11th American edition, 221, (note).
Abbott on Shipping, 5th edition, 165, et seq.
2 Taunton, 414; 1 Camp. 532; 4 Taunton, 4–52.
Assignees of Holmes vs. Bowles et al., 10 East. 279.
Moores vs. Hopper, 2 Bosanquet & Pullen's N. R. 411.
Morrison vs. Parsons, 2 Taunton, 407.
Meyer vs. White, 7 Carrington & Payne, 41.
Robson vs. Drummond, 2 B. & Ad. 303.
Grace Himble vs. Hunter, 12 Adolph. & Ellis, N. S. 310.

It is in fact an unquestioned rule in pleading.

According to the seventh finding of facts, the act of *Forestier & Co.*, acting with the knowledge of *Gomila & Co.*, in surrendering the *Gomila* charter-party and taking a charter-party for the same cargo, for the same voyage, had changed the legal relation of the owners to the parties and this cargo. *Gomila & Co.* were no longer the charterers. The ship could not be held to two charter-party contracts at the same time. Nor could *Gomila & Co.* make themselves charterers again without the consent of the owners of the Deronda. *Forestier & Co.*, in making this change of parties, acted with the knowledge of *Gomila & Co.*, and the owners of the Deronda had the right to consider them the agents of Gomila & Co., for the purpose of making the change, as by the terms of the alleged agreement between *Gomila & Co. and Forestier & Co.*, both the cargo and charter-party were to be the property of Forestier & Co. Nothing short of

consent of *all* parties or a decree in equity on a sufficient bill could put Gomila & Co. back into the legal status of charterers of the ship. At the date of the commencement of this suit Gomila & Co. had *no charter-party* upon which they could bring any action.

It is not pretended that *Forestier & Co.* ever transferred their charter-party back to *Gomila & Co.*, at the time they pretended to reject the grain contract. On the face of the findings and record it appears that *Forestier & Co.* never re-delivered the cargo to *Gomila Co.*, but held it in their control all of the time by holding without intermission the character of charterers of the Deronda for the voyage.

The last clause in the eleventh finding is curious and significant evidence of collusion of *Gomila & Co.* and *Forestier & Co.* against the owners of the ship. "*The charter to Gomila & Co. having been destroyed by DeWolf, they made protest for substitute, and then, for want of such charter, used copy of one issued to Forestier & Co., to make title.*"

If this was not a trick to bring about a small price at the proposed auction sale, why did not *Forestier & Co.* endorse over *their charter-party* to *Gomila & Co.* or the purchaser? It was apparently fraud, with no attempt at concealment or disguise, to hold the charter-party against all purchasers, to force a sale to themselves.

At the auction sale a cargo under the legal control and direction of *Forestier & Co.*, by the terms of a charter-party, in which they were charterers, was offered for sale, and *Forestier & Co.*, who wanted a cargo, stood by and allowed the cargo to be sold for a gross sum of $30,557.60, or as the auctioneer says, *thirty-seven cents a bushel*, on the 7th day of July, and yet pretend to have bought the same cargo after it had nominally passed through the hands of *Carriere & Sons* and J. B. *Camors & Co.*, for $40,422.00, yet the circuit court found the auction sale a fair sale, determining

the market value of corn in New Orleans. We respectfully submit that taking the facts as they appear in the pleadings and findings, it is clear that the charter-party was in *Forestier & Co.*, when the ship was loaded, and that neither *Gomila & Co.*, or *Forestier & Co.*, ever intended that *Gomila & Co. should* be reinstated as charterers. It is manifest that both firms were in collusion to wrong the owners of the ship for their own profit and advantage in damages to be recovered from the owners.

It is not pretended that there was any fraud in the cancellation of the Gomila charter-party, or in the execution of the new one to Forestier & Co.

If for the purpose of argument, it is admitted that the circuit court could resurrect the extinguished *Gomila & Co.* charter-party, and deal with it as in force, in disregard of the new relation between the owners of the Deronda and *Forestier & Co.*, the record does not sustain or warrant any decree against the appellants on either of the charter-party contracts.

The construction of the charter-party contract is a question of law, to be determined by the text of the contract as written.

The court committed manifest error in construing the charter-party as a contract in which there was a covenant that the ship would take on board 10,000 quarters of corn *during the month of June*; that is, that there should be read into the stipulation "*steamer is guaranteed to carry not less than ten thousand quarters of 480 lbs.*" the additional covenant, "*and to take the same on board before twelve o'clock midnight, of the 30th of June, 1883.*"

That is, a new covenant that the time when the loading should be completed was made the essence of the contract and the limit of performance as an express time covenant, was *midnight of the 30th of June, 1883.*

The first objection to this construction is that the libellants did not claim this construction in their libel, and never declared on any such covenant; not one word of any such construction can be found in the libel.

It is both a finding of fact and an admitted fact about which there is no contention, that the ship did take on board, carry and deliver more than 10,000 quarters on that same voyage.

The next objection, to this conclusion of the circuit judge is, that neither of the charter-party contracts as written will bear that construction as matter of law.

From one end of the contract to the other, there is not a single mention of the time when *any act* shall be done; no time for the commencement of loading is fixed; no time when loading shall be completed is fixed; on the contrary, *sixteen running lay days (Sundays excepted) are given to charterers within which to load or unload the ship*, and "ten days on demurrage" are provided for in additon to the stipulated lay days; no date for sailing on the voyage is fixed by the contract, or attempted to be covenanted for; no date for the completion of the voyage and delivery of the cargo at the port of delivery is mentioned or stipulated in either of the contracts, yet the court construed time to be the essence of the contract in the particular of the time within which the cargo should be received on board, in violation of every known and honored rule for the construction of contracts, settled centuries ago.

The circuit court could not lawfully make time the essence of this contract from anything written in the contract itself.

It is not enough to make time the essence of a contract that the parties should name the time of performance in the contract, but it must appear from the contract itself that they really intended to make such time a real element and consideration of their agreement.

Bernard vs. Lee, 97 Mass. 92.
Seton vs Slade, 7 Ves. 265.
Hepburn vs. Dunlap, 1 Wheat. 196.
Brasheer vs. Gratz, 6 Wheat. 533.
Taylor vs. Longworth, 14 Pet. 174.
Fuller vs. Hovey, 2 Allen, 325.
Goldsmith vs. Guild, 10 Allen, 241.
Kirshof vs. Voss, 67 Tex. 320.
Watson vs. Walker, 67 Tex. 651.

Where no specific time for loading is named in the charter-party reasonable time is the true construction.

Adams vs. Royal Mail Steam Co., 5 C. B. N. S., 492.
Huns vs. Dreesman, 23 L. J. Exch., 210.
Chitty on Contracts, 433.

There might, perhaps, be occasion to discuss what law governs the construction of this contract in this particular, and whether the rule in equity applies, if any time had been stipulated, and this court had not, in the case of *Watts vs. Camors*, 115 U. S., 353, held that courts of admiralty administer the rule as laid down in equity and under that rule, refused to enforce the provisions of express statutes of Louisiana governing contracts in Louisiana, where the contract was made and broken in that state. The Camors and Gomila of that case are the Camors and Gomila of this case.

If it was permitted by law to consider the antecedent and surrounding circumstances to modify, enlarge, or restrict the term of a written contract, where there is no ambiguity in the writing itself, there is nothing in the surrounding circumstances to warrant or justify the action of the circuit court.

At the time when negotiations commenced, that is, on the 16th of June, the ship was not in port, but prosecuting a voyage from a distant sea. It was not known when she would arrive at New Orleans.

The vessel had a cargo; its precise nature and quantity were unknown to all parties in New Orleans. They did not know how much time would be consumed in discharging the cargo to be brought in on the ship, or whether the ship would arrive in time to discharge in June. The agents of the owners were not able to determine, from all of the knowledge of the *ship in their possession* at that time, whether the ship could carry 10,000 quarters of corn, nor how much space must be reserved for coals; whether the ship coaled *en route*, or went through without coaling on the contemplated voyage. Gomila & Co. were to be the shippers and stow the cargo. The ship owners, if possessed of common caution or common sense, would not enter into a warranty that Gomila & Co. would be honest in their loading the ship, or put themselves in a position where they might be made liable on a covenant by the rascality, indifference or negligence of Gomila & Co.

After the ship arrived, the situation did not change. It was then the 18th of June. The inward cargo was on board to be discharged. The findings show that it required ten days to discharge the ship. After the discharge of the cargo, the ship must be dunnaged and ceiled to fit it for a grain cargo. The master was doubtful when the ship could be got ready, and in great doubt whether the ship would carry the cargo. A storm might wreck Gomila's grain elevator. The steam machinery on the floating elevator might fail or be wrecked, and become useless, and compel the loading to be done by ordinary means, and the slow process of hand labor. All parties agreed that it tested the ship to its full capacity to carry the cargo, and that there must be honest and careful stowage. It took all of the cunning and interested logic at the command of Gomila to overcome the apprehension of the master, that the ship could not carry the cargo and sufficient fuel to reach the nearest available coaling station, at which he could obtain fuel to complete the voyage. Gomila & Co. were eager for the charter-party. For them there

was no other available vessel in port. The owners were reluctant to charter, and dissatisfied with the rate of freight. It is pretended, even found as a fact by the court, that the master and the agents of the ship knew the terms of the alleged grain contract, and that the corn market had declined below sixty cents per bushel.

Is it possible, considering the ordinary caution of men entering into onerous contract obligations, with all of these conditions, many of them under the control of Gomila & Co., the proposed charterers, others subject to the rule and control of chance and accident that the owners could not direct or control, when continuous rainy weather alone would have rendered the loading impossible, that the owners would have bound themselves or the ship in a contract warranting the charterers against their own rascality, accident, the elements, or any loss on a gambling grain contract for *the entire cargo*, in a stipulation warranting that the *charterers* would have the full cargo on board in June.

Does the stipulation for lay days and demurrage import nothing in construing the contract as written? Is there nothing of inference as to the real intention of the parties that the execution of this Gomila charter-party followed as the result of previous conversations and telegrams, during which the court finds that the grain contract of June 7th was exhibited and made the subject of conversation, and it is said made part of the representation of Gomila; and yet, when the parties come to chrystalize their negotiation into a solemn written instrument, there was no warrant that the grain should be on board in June written into the contract; or in the fact that on the 29th of June, when Forestier & Co., the pretended purchasers of the cargo and charter-party, surrendered the Gomila charter-party, knowing that the grain was not all on board, they did not demand in the

charter-party given them a warrant that the ship would have the cargo all on board in June?

There is not one word of finding of any usage of the port of New Orleans or of trade in grain cargoes by which any such warranty can be incorporated into the contract, even if the law allowed usage to change the written contract, as the circuit court has done, or must have done, to warrant any decree against the appellants.

The task of analysing the record to ascertain how the court dealt with the case and how, in accordance with any known rule of law, it justified the decree entered, is not light, and necessarily, from the record made, involves much conjecture where there should have been certainty.

It is probable that the circuit court made use of antecedent conversations, acts and negotiations between the agents of the ship and her owners and Gomila & Co., *prior* to the execution of the written contract, to modify the written contract subsequently made, and carried into the written contract covenants not written into the completed contract. This would seem incredible if there were not special findings of fact immaterial for any purpose other than an attempted justification for changing and enlarging the written contract.

The first finding is a special grain-contract between *Gomila & Co.*, sellers, and Forestier & Co., buyers, with the terms of a contract of the date of June 7th, 1883, long anterior *to any negotiations* for the charter.

The second finding deals with the date of the arrival of the Deronda in the port of New Orleans on June 18th, 1883, with a cargo of salt and fruit, and finds DeWolf & Hammond agents of the ship. That "*Gomila & Co., having the contract aforesaid with Forestier & Co., insisted on owners' guarantee that the Deronda would carry 10,000 quarters of 480 lbs.*" There is nothing in this find-

ing of any warrant that the ship should have that cargo on board in June, 1883.

"Whereupon, the following cable dispatch was sent to Hammond, who was then in Europe, and in communication with claimants:"

"JUNE 16th.

"To W. J. Hammond, Liverpool:

"Deronda. Am offered 5–6, Copenhagen, Aarhous, calling at Elsinore for orders. She must be guaranteed to carry not less than 10 000 quarters. Charterers to have power of canceling charter-party if vessel is not ready to load cargo by 25th of June."

That on the 18th of June Hammond replied by cable:

"JUNE 18.

"Fix Deronda 5–6 Aarhous. Guarantee 10,000 quarters, providing captain agrees. * * * "

The third finding is that on the 18th the agent and captain of the ship and Gomila & Co. consulted together concerning the capacity of the ship to carry 10,000 quarters, both parties reaching the conclusion that she could; and Gomila advised the master to cable the owners that she could carry the quantity. A cable message was made up by the master and DeWolf from Gomila's code book, in which the court finds the master said: "The vessel will carry 10,000 quarters of grain if we coal at Halifax." This is a mistake in fact, as the only telegram sent on the 18th of June was the one given in full in the same finding. (This error the court refused to correct, as set out in bill of exception No. 3, record, 231.)

The substance of this cable of the 18th is, that the captain believed the ship could carry the cargo, and left question of chartering the ship for owners' action and approval. On the 19th, Hammond (partner of DeWolf) cabled DeWolf:

"Fix Deronda, after hard work, owners accept your offer, but you must exclude Rouen * *."

There is in these findings and telegrams not one word of any guarantee that the ship should have 10,000 quarters on board

before the end of June. Therefore, the court found nothing of any such "guarantee" discussed or negotiated prior to the completion of the negotiations by the execution of written evidence of the contract finally settled on as the result and merging of all prior negotiations.

It being impossible to find, from the negotiations and conversations between the parties prior to the written contract, that there was ever any warrant that the ship should complete loading before the end of June, how did the circuit court construct the warranty injected into the charter-party by the court?

The circuit judge was pressed by counsel to definitely state whether he had modified the contract by reference to the negotiations, telegrams and correspondence between the ship's master and agents and the owners preceding the execution of the contract in writing, or the telegrams and correspondence between the same parties after the contract was reduced to writing. The only answer that could be obtained is found in the memorandum "in explanation," record, 227.

"The findings show how far I have considered letters and telegrams passing between defendants and their New Orleans agents.

"All evidence of negotiations and declarations of the parties prior to the execution of the charter were admissible to show that the defendants had notice of the special inducements of the libellants to enter into the contract, and evidence of the conduct and declarations of the parties subsequent to the breach was admissible to show what each did to save himself and others from damages. And so far as I have admitted the letters and telegrams passing between defendants and their agents.

"As to the law in the case, I agree with the district judge, as I have on the facts, except as to the *quantum* of damages."

Referring to the opinion of Judge Billings, the district judge referred to, printed in full on page 192 of the printed record, the court will find that both judges, while finding no latent ambiguity in the written contract, resorted to correspondence

between the *owners and their agents*, and antecedent conversations and negotiations to import into the written contract a new and special covenant of warranty that the ship would take on board 10,000 quarters before *the end of June, 1883*, when there was no such covenant written in the deed. This course was in express violation of the rules of construction of contracts in writing, in every state in the Union, in fact, of all reputable systems of law of any country.

The rule of law relating to construction of contracts in writing is, that unless fraud, accident, mistake or ambiguity are set up in the proper form and in the proper tribunal, the construction of written contracts is matter of law to be applied by the court, and the intention of parties must be ascertained from the written terms of the contract itself. This has been too long settled to require citation of authority.

All prior negotiations are merged in a subsequently written contract; such written contract "is presumed in law to express the final understanding of the parties." "If the contract did not express the true agreement, it was the claimants' folly to have signed it."

Brawley vs. U. S., 96 U. S. 168.

Evidence of prior correspondence, conversations or negotiations is inadmissible to alter or import a new obligation or covenant into a written contract.

Cockburn vs. Alexander, C. C. B. 791.
Shire vs. Wilson, 5 Scott, N. R. 958.
Smith vs. Jeffryes, 15 M. & W. 561.
Ford vs. Yates, 2 Scott, N. R. 645.
Lewis vs. Marshal, 7 M. & G. 729.
Phillips vs. Briard, 25 L. J. Exch. 233.
Hudson vs. Clunentson, 8 C. B. 213.
Sotibichas vs. Kemp, 18 L. J. Exch. 36; 3 Exch. 105.
Sinclair vs. Stevenson, 2 Bing. 514.

Farquharson vs. Barston, 4 Bligh, N. S. 560.
Bromley vs. Johnson, 10 W. R. 303 (Exch).
Emery vs. Parry, 17 L. T. N. S. 320.
Angell vs. Duke, 32 L. T. N. S. 320.

The same rule obtains in the United States, and except in case of fraud, accident and mistake, is the same in equity.

Brawley vs. U. S., 96 U. S. 168.
Willard vs. Tayloe, 8 Wall. 557.
Forsythe vs. Kimball, 91 N. S. 291.
The Delaware, 14 Wall. 579.
Bliven vs. New England Screw Co., 23 How. 420.
Allericks vs. Ford, 23 How. 49.
Grace vs. Insurance Co., 109 U. S. 278.
Railroad Company vs. Howard, 13 How. 337.
Bank of U. S. vs. Dunn, 6 Pet. 51.
Sprect vs. Howard, 16 Wall. 564.
Brown vs. Wiley, 20 How. 442.
Brown vs. Spofford, 95 U. S. 474.
Martin vs. Cole, 104 U. S. 30.
Renard vs. Lampson, 2 Kernon.
N. Y. Court of Appeals, 561.
Bedford vs. Flowers, 11 Humph. 242.
Warren Academy vs. Starrett, 3 Shep. 443.
Goodloe vs. Hart, 2 La. 447.
Adams vs. Gaynard, 5 N. S. (La.) 249.
D'Aquin vs. Barbour, 4 La. Ann. 441.
Ripley vs. Paige, 12 Vt. 353.
Cook vs. Parkenson, 16 La. 129.
Arnous vs. Darem, 18 La. 43.
Labouve vs. Declouet, 19 La. 381.
Boodey vs. McKenney, 10 Shep. 517.
Jarvis vs. Palmer, 11 Paige, 650.
Renshaw vs. Gans, 7 Barr. 117.
Elmaker vs. Ins. Co., 5 Barr. 183.

Whitney vs. Lowell, 33 Maine, (3 Red.) 318.
Smith vs. McCall, 1 McCord, 220.
Airey vs. Brig Ann C. Pratt, 1 Curtis, Ct. Ct. 395.
Perrine vs. Cheeseman, 6 Hulst. 174.
Hanson vs. Stetson, 5 Pick. 506.
Pierson vs. Hooker, 3 Johns. 68.
Bradley vs. Anderson, 5 Vt. 152.
Coon vs. Knap, 4 Selden (N. Y.), 402.
Gardner vs. Chase, 2 R. I. 112.
Esser vs. Ins. Co., 16 Pick. 502.
Driscoll vs. Fisk, 21 Pick. 217.
Keller vs. Webb, 126 Mass. 393.
Black vs. Batchelder, 120 Mass. 171.
Lewis vs. Thatcher, 15 Mass. 431.
Lee vs. Ins. Co., 3 Gray, 583.
Conner vs. Clark, 12 Cal. 168.

We have made this liberal citation of authorities to show that the doctrine is old and general, and should not have been overlooked in the lower courts.

The appellants had the right to believe that the circuit court would apply this rule of law to the evidence with which it was dealing.

The cases cited also establish the doctrine that the same rule obtains in reference to communications and negotiations between parties *after* a written contract has been entered into.

Parties to contracts in writing cannot take away from the courts the power and duty of construing their contracts when they are put in litigation, although, of course, courts will look into subsequent negotiations to ascertain whether the original contract has been modified by any *new contract*, the result of subsequent negotiations between the parties. No new contract is alleged in this case.

If it is objected that the record in the circuit court does not

show any bills of exceptions concerning the admission of testimony of antecedent correspondence, the answer is, that the testimony went to the district judge under objections in a forum where no bills of exception are allowed. The same evidence went to the circuit court with the same objections by transcript. No human intelligence is equal to the anticipation of what any court will do with evidence ; both parties are usually equally surprised by the course of courts trying facts.

If the system of trial of admiralty appeals under the existing statute can be so construed that circuit judge sits as a mere referee to try the case upon evidence, otherwise than in accordance with well established rules of law, the system is worse than the bar believes it to be. Objection or no objection, the circuit judge was bound to try the contract by its own written terms, even if there had been oceans of evidence, contradicting every written stipulation admitted without objection. This is the doctrine of *Black vs. Batchelder, 120 Mass. 171,* where the question was squarely made and determined.

The decree in this case could not have been reached, nor can it be sustained, unless a new covenant of warranty that the ship should have the 10,000 quarters on board in June, is adjudicated into the contract.

The fourth finding of law is not very explicit or intelligible. If it means that the court enlarged the contract, it shows undoubted error. If it means that because there was liability to loss on the pretended grain contract, of which both parties had knowledge, or notice before the contract was put in writing, and that the owners of the ship accepted all risk of loss on the grain speculation, it is equally wretched law.

The presumption of law is, that the liability to loss, by somebody, if the grain was not on board before the end of June

having been, as the court finds, fully considered in the antecedent negotiations, a warranty that the ship would have that cargo on board before the end of June was not written into the contract, because the ship owners would not consent to be so bound in a charter-party into which they entered with reluctance.

If it was admitted that the circuit court did not err in the construction of the charter-party contract with Gomila & Co., or in finding in effect that it was not cancelled by surrender, there is fatal error in the decree apparent on the record.

Before finding the ship in default, the court should have found that Gomila & Co. had, in all things, fulfilled their covenant to furnish and properly stow the cargo within the time covered by the pretended warranty.

The ship *had* carried and delivered 10,000 quarters on a former voyage; she did carry and deliver that quantity and cargo on the very voyage to which this contest relates. The master of the ship had arrived at the conclusion that the ship would carry the cargo only under the potent charm of Gomila's logic. At the conference described in the third finding of fact, when the cablegram to the owners was made up from Gomila's code book, all parties agreed that *it was a full cargo* for the ship; that she needed all of her stowage room for the cargo, and must carry short supply of coal at the outset of the voyage and therefore must coal *en route.*

No party to the deal knew better than Gomila that it was indispensable that the ship should be well and skillfully stowed by the most competent stevedoring experience and skill.

Under the terms of the charter-party Gomila & Co. had the appointment of the stevedore that the ship was compelled to

accept. Their obligation under the contract was to give the ship the services of *both honest and competent stevedores.*

How was this covenant carried out? As shown in the facts found in the bill of exception No. 1, it was carried out by setting a paper peddler and the keeper of a rum mill to tumble the grain into the ship as it might happen to fall from the steam elevator, and swindling the ship by a rascally bill for what should have been the proper price for competent skill, but which was never paid nor incurred by Gomila & Co. Considered either as a money or business transaction or performance of the conditions of the charter-party to be performed by Gomila & Co., there is no name too severe for its proper designation.

The grain was sent into the ship by powerful steam machinery, falling by gravity in cones under the hatches. Skill and honest care was necessary to move the grain so that it should be distributed not only to all parts of the hold, but to fill up under the beams so that there should be no waste space. Neeb *was the weighmaster on the elevator*, charged, as it appears by the 15th finding of fact, with such particular attention and minute accuracy in weighing cargo as to note and report *two fifty-sixths of a bushel or two pounds* in a cargo of over 9,635 quarters of 480 lbs., which the court finds *to have been 82,588 2-56 bushels.* Neeb, therefore, if he had been a stevedore, was charged by Gomila & Co. with a continuous duty in weighing, that excluded all possibility of rendering any service in stowing the ship.

The result of this fraudulent act of the charterers in bad stowage, was that they filled up the ship so as to leave out less than eighty tons of the cargo that the ship would have taken if properly stowed. The court, in the same spirit in which it made its other findings, in the twelfth finding, concerning the re-stowing of the cargo, says: "That a large quantity of coal and water, the latter from the ballast tanks, having been taken out,"

etc. The addition of eighty tons to the cargo of a vessel of 1090 tons, would make a scarcely perceptible difference in the immersion or the draft of the ship. In this finding we have the court's understanding of the term "large quantity."

There is no finding that the ship was properly stowed. On the contrary, the court, in bill of exception No. 1 (Rec. p. 229), further found:

"That on the —— day of July, 1883, the captain of the ship employed John Beatie, a regular stevedore, to break out a part of the cargo in the between decks to get at the coal bunkers, and in doing so, John Beatie testified that he found that the cargo had not been properly stowed. Other evidence tended to show that the cargo had not been properly stowed."

The deposition of John Beatie, printed on page 172, *et seq.* printed record, shows the wretched stowage, and how the full cargo was put into the ship by Beatie, and we believe may be properly referred to, to determine whether the court ruled correctly in refusing to give any effect to the facts found in the first bill of exception.

The only excuse for refusing to give any effect to the fact that Gomila & Co. stowed the ship badly is given by the judge himself in this bill of exception, he states that he "had disregarded the same and given no legal effect thereto, because the pleadings presented no issue under which such facts could be considered legal evidence;" and a still more incomprehensible excuse contained in the memorandum, "in explanation," "that by the terms of the contract, charterers were not to be responsible for stowage."

As to the reason given in the bill of exception, it is too specious to require attention. Since *Watts vs. Camors*, it is difficult to tell what system of law governs the contract of charter-party in Louisiana; if it be equity, civil law, or common law,

the rule common to all of these systems is, that in case of commutative contracts containing mutual reciprocal obligations running from each party to the other, neither party can recover against the other without first establishing, by proof, that he has in all things performed all of the covenants to be observed and performed by him.

The court, in conscience, could not hold the ship liable for damages for a breach of a covenant to take the cargo, when the breach, if any, was occasioned by the breach of Gomila & Co.'s covenant to load the ship with skill and with proper stowage.

It is a material indispensable averment in the libel, "that the libellants have well and truly performed and kept all of the covenants and undertakings on their part in said charter-party to be performed and kept." On this averment there was square issue in the answer by denial of the averment. It is idle to say that there was no issue that put the libellants upon exact proof of full and exact performance on their part.

The reason given in the memorandum "in explanation," "*that charterers were not to be* responsible for stowage," is equally incomprehensible, taken either as a statement of fact or conclusion of law, yet it throws light upon the temper and spirit with which the court approached the duty of construing the contract.

As a conclusion of fact, it is controlled by the terms of all the stipulations written into the contract. Considered in relation to either the common law, civil law, the law merchant, equity and the law of common honesty, there can be no doubt concerning what Gomila & Co. covenanted to do or what construction must be given this stipulation.

1st. It was a covenant that in appointing a stevedore to stow the ship, *Gomila & Co.* should exercise both common intelligence and integrity in the selection and held them to select a competent stevedore possessed of requisite skill and experience to stow the ship skillfully and to her full capacity, as the charter

became more valuable to the ship in proportion to the excess over 10,000 quarters that could be stowed in the ship, increasing the earnings of the ship at the rate of a stipulated sum in money per quarter for the excess over the minimum up to 12,000 quarters. The ship was to pay the price required to obtain skillful service. That fact made the obligation of *Gomila & Co.* more rigid and severe; as there was, as far as they were concerned, no question of expense in the observance of their covenant in this particular. They were bound in stowage to protect rather than cheat the owner of the ship.

There may be some doubt, in the absence of proof of any particular usage in the port of New Orleans, in construing the phrase, "under captain's directions." It is, however, immaterial in this controversy what construction is given this clause. It would defeat the action if it appeared *that both the charterers and master* conspired and acted together in stowing the ship badly.

The charterers could not escape the result of unskillful, negligent stowage by showing that the master was equally unskillful and negligent. To claim damages for the breach of a contract, it is indispensable that the party claiming damages shall show himself free from *any fault or agency* in causing the breach.

The court seems to have based its hope of justification for its construction upon the last clause in the stipulation, "*charterers are not to be held responsible for improper stowage.*"

Courts have always felt held to regard the rules of common honesty or at least commercial integrity, as in continuous operation, and construe written contracts as if the parties knew the rules and intended to be governed by their observance in the performance of contracts.

If this stipulation will bear the construction given it by the circuit court, the charterers could bind the ship for the

loss of their own cargo stowed on board the ship *by themselves*, if the loss occurred through bad stowage resulting from gross negligence, ignorance, or even rascality of the owners of the cargo in stowing their *own cargo*, or, in other words, compel the ship to pay the charterers premium or reward for their own faults or roguery.

Taking this clause in connection with the entire contract, the construction most liberal to the charterers, that can be given the stipulation is, that in the event that the charterers brought reasonable skill and experience to the stowage, they must still be responsible for bad stowage as far as their own property is concerned if it suffer from bad stowage, but not responsible to the owners of the ship, if the ship should be lost, or damaged, through bad stowage, unless there was actual fraud on the part of the charterers; that is, the charterers warrant stowage as far as their goods are concerned, but not as to the ship.

This is the doctrine of the following cases, where substantially the same stipulation existed and was considered.

The stevedore is the agent of the shipper and charterer where the shipper or charterer has the appointment.

Sir Thomas Blaike et al. vs. Stembridge, 6 Common Bench R. N. S. 225.

Swanton vs. Yorick, 2 L. J. N. S. 225.

The fact that the stevedore is paid by the master does not make him the agent of owner or ship.

Quarman vs. Burnett, 6 M. & W. 499.

Major vs. White, 7 C. & P. 41 (Parke).

The Catherine Chalmers, 32 L. J. N. S. 847.

The case at bar, being a case where the charterers were stowing their own goods, is emphatically a case where the doctrine should be applied.

We do not attempt to deal with the questions raised by bills of exception Nos. 2, 3, 4 and 5, or the question whether the case is here in such form that the court can look into the evidence on which the circuit judge acted, brought up by these bills. That task has been assigned to other counsel.

We believe, however, that bill of exception No. 4 (record, 233) has the effect to make the memorandum "in explanation," annexed to the final findings of the court (record, 227) a part of the record in this court, if without the bill it could not be so considered.

It is impossible to determine exactly upon what law, or upon what facts the court acted in measuring the damages at $23,993 76, but it is certain that the measure cannot be correct, even if any damage should have been allowed.

An examination of the findings of fact, in so far as they in any way relate to the *quantum* of damage, shows no possible justification for the gross sum allowed, or for any of the detailed items given to make up the total allowance.

If it is assumed that by any possibility the owners of the ship could become liable for Gomila & Co.'s alleged default on their grain contract because of any stipulations in the charter-party, the damages must be measured by the law as applied to all of the surrounding facts.

The court finds the contract to have been as set forth in the first finding of fact. That is, Gomila & Co. agreed to sell Forestier & Co., in New Orleans, not less than 10,000 quarters of corn, of 480 pounds per quarter, to be delivered to the seller, *in New Orleans*, at any time in the month of June, 1883, the time of delivery to be at Gomila & Co.'s option, for sixty cents per bushel of fifty-six pounds. Gomila & Co. to deliver the grain on board a vessel to be chartered by that firm. Sixty cents per bushel less that portion of the expense of barges, elevators and other incidents of expense of getting the cargo on board, falling upon

Gomila & Co. was the total net benefit that could accrue to Gomila & Co. from the sale. If the sale failed, their situation was: the grain on hand, with its market value in New Orleans. All that they could legitimately lose would be the fall in price in New Orleans. As under their option as to the time in June at which they would deliver, the presumption is, that they did not purchase for delivery until delivery was necessary. and that the value of the corn to them was its market price in New Orleans on the day of delivery.

The court found neither the price at which Gomila & Co. purchased or held the corn, nor any difference between the market and the sixty cents per bushel they were to receive from Forestier & Co. If Gomila & Co. were entitled to any damages at all, it was the difference between the value of the corn to them on shipboard and the sixty cents per bushel they were to have had from their vendees, for that would have put them in the same situation as if there had been no alleged default by the ship, or if Forestier & Co. had made default in carrying out their part of the contract, and had paid difference in market value, all that could have been demanded of them, in case of their active or passive default on the grain contract.

The court, as shown by details given in the seventeenth finding, ignored the law governing measure of damages.

The first item is, "amount of commissions paid Forestier & Co., $3,194 29. If the evidence in the record cannot be inspected to explain this item, it is commission to a vendee for a sale to himself, according to the finding of the circuit court never consummated by delivery, and which the vendee repudiated. As the finding stands, there is no apology for charging the item against the appellants.

The figures agree with one of the schedules annexed to the libel (record, 4, statement X), and probably the court based its finding on the schedule.

An examination of the schedule makes the finding more monstrous. "Statement X" is a wonderful document.

"Messrs. Gomila & Co. to E. Forestier & Co. for *non-fulfillment* of sale of June 6th, 1883:

10,000 qrs. No. 2 mixed corn, at 28½ per qr., cost freight and insurance	£14,062 0 0
Less freight, $\frac{5}{9}$ per qr.	2,875 0 0
	£11,187 0 0
11,187,—%, @ ex., 487¾	$54,564 00
Harbor risk on 55,700, ⅜%	348 12
Cable expenses	80 00
Difference in exchange on $54,564 60, ½%	272 82
	$55,265 54
10,000 qr. No. 2 mixed corn, 85,714$\frac{2}{5\,6}$ buss. at 60¾ cts.	$52,071 25
	$3,194 29

No comment is necessary, perhaps, yet it is curious to note that while the court finds a written contract selling the corn at *sixty cents* per bushel, this document is made up on the basis of *sixty and three-fourth cents* per bushel. The items of exchange never drawn, harbor risk on property which it is pretended never vested in Forestier & Co., so as to give them an assurable interest, adjudged to be expenses connected with a sale between two merchants doing business on the same street, and difference in exchange on price never paid, are incomprehensible items of damage to be charged against the respondents, to say nothing of taking twenty-eight and one-half shillings sterling, as the basis of value per quarter, in settling the loss on a New Orleans sale

It is probably not worth the inquiry where on the habitable portion of the globe, mixed corn was worth that price on that day, when it is not disputed that the rejected corn was in New Orleans, where the alleged contract was made. The court, in the tenth finding, took Gomila's statement that such grain was worth only twenty-three shillings in England and France, except on rye terms (shippers' guarantee of sound condition on arrival), when

it was worth twenty-four shillings according to Gomila's telegrams, which we suppose may be considered doubtful evidence.

The next special item of damages found by the court in the 17th finding is,

"Loss on 9,635 quarters (82,588 2 56 bushels) of corn being, difference between price of the sale to Forestier & Co., and the sale at auction to Carriere & Sons, $20,549.39."

The mathematics in this computation seems as halting as the law by which this item is charged as damages. It would be impossible to conjecture how this total was reached, if it was not evident from the similarity of figures that the court took that item without question from the schedule annexed to the libel. (R. p. 4.)

There it appears again that although the terms made in the written grain contract a part of finding number one, show the sale to Forestier & Co. to have been at sixty cents per bushel of of fifty-six pounds, the schedule makes the price *sixty and three-fourths cents per bushel.*

The statement in the schedule is—

"82,588 2-56 bushels sold at 60¾ cts. per bushel.....$50,172 23
82,588 2-56, sold at auction..... 29,622 84

$20,549 39"

There would seem no excuse for departing from the terms of the contract to swell the selling price to Forestier & Co, three-fourths of a cent per bushel, when the court intended to take the unfair sale at auction, at thirty-seven cents per bushel, as the actual market value of the corn in New Orleans, and charge the ship with the difference as damages.

We have already shown that the pretended auction sale did not establish the market value of corn in the market at New Orleans at the date of sale; that the result of that sale could not be taken as the basis of value to estimate damages either lawfully or honestly, does not merit discussion.

How the remaining item of $250 08, loss on 365 quarters (3,126 bushels) was made up by the court, is also beyond comprehension. There is no finding of the value of corn of like character either in New Orleans or abroad. The mathematics and computation, so far as they can be tested, are faulty and incorrect. What becomes of the all-important 2-56th of a bushel does not appear, but it is certain that it was not on the basis of 37 cents a bushel, the pretended price at the auction sale of the balance of the 10,000 quarters. It is evident that it is intended to be the difference between *some* market rate and the rate of sale to Forestier & Co., but whether at 60 or 60¾ cents cannot be ascertained.

If the appellants had been the actual vendors of the grain to Forestier & Co. they could have been charged with no such measure of damages for default. If they had been vendees and Forestier & Co. had defaulted or refused to take the cargo, they could have received no such damages from Forestier & Co. under any known rule for the measure of damages, and it is difficult to comprehend how, as carriers of the goods, they incurred a larger liability or on what theory they have been condemned in this decree.

We are willing to concede that perhaps there is no branch of the law so unsatisfactory and apparently conflicting as the law relating to the measure of damages for the breach of contract. It seems to be an emotional branch of jurisprudence, in which courts have yielded to a large extent to feelings excited by the facts of the particular case under consideration, making it difficult to reconcile adjudicated cases, even when considered with all the facts in each case fully stated. Nevertheless courts have usually kept within hailing distance of certain general rules.

Formerly it would have been considered that in estimating the possible damages, if any, on this contract, at least, on the

grain contract, the law of Louisiana should be consulted as to measure.

The statutes of Louisiana recognize two methods by which a breach of contract may occur: actively, by doing something inconsistent with the obligation; and, passively, by not doing what was covenanted to be done. C. C. art. 1931. When the breach has been passive only, damages are only due from the time when the debtor has been put in default in the manner directed by the code, subject to the condition that when the thing to be done was of such nature that it only could be done within a given time, which has elapsed, or under circumtances which no longer exist, formal putting in default is not necessary as a condition precedent to damages C. C. art. 1933).

When the object is anything but the payment of money, and the breach passive only the damages due the creditor for the breach are the amount of the loss he has sustained and the profits he may have been deprived of, if he is not at fault for the breach, with the same doctrine as to direct and remote or contingent profits, as obtains at common law. The rule that the damages shall be such as the parties reasonably contemplated, is also the same as at common law.

The default declared the indispensable prerequisite to the recovery of damages for passive breach of contract, is provided for in articles 1911 to 1915, inclusive.

The debtor can be put in default in different ways, where the obligation is a contract to do or perform any act: 1st, by the contract itself, where it is stipulated as part of the contract that non-performance shall be deemed default; 2d, by the act of the creditor, when, at or after the time stipulated for performance, he demands specific performance, which must be made by either an action for specific performance or by a demand in writing made by a notary public, with protest, or by

a verbal requisition made in the presence of two witnesses (C. C. 1911).

In case of commutative contracts, with reciprocal obligations, the creditor must have performed all covenants to be performed by him prior to the alleged default, and must offer to perform all acts to be done by him at the time and place stipulated in the contract. C. C. 1913.

If Gomila & Co. were in any degree at fault in properly stowing the ship, they were not in a condition where they could put the owner of the ship in default, or lay the basis of damages, even if the contract will bear the construction they have given it, as to loading in June.

It cannot be doubted that the statute of Louisiana is a fair and philosophical rule, and, except as to the particulars and details of putting in default, is in fair accord with the rule in both common law and equity.

The Supreme Court of Louisiana has given a fair and consistent interpretation and application of the statute.

The vendee cannot be put in default until vendor complies with his part of the agreement.

Provosty vs. Putnam, 19 Ann. 84.
Wilbur vs. McGillicuddy, 3 La. 382.
Brashear vs. McMasters, 15 La. 282.
Rucker vs. Lidell, 5 Ann. 577.
Dawson vs. Duplantier, 15 La. 289.

The authorities on this subject are compiled in 2 Hennen's Digest, 1019, *et seq.*, under the head of "*Default as a condition precedent to recovery on contracts, their reversion or damages.*" And on page 1021, under the head "*When default is unnecessary.*"

The district judge failed to comprehend or apply the law of Louisiana (opinion, rec. 195). He cited *Cable vs. Leeds*, 6

Ann. 293, to show no default was necessary. The case is misstated in the opinion. The contract was for a crank to be delivered, not "as soon as possible," *but on the evening of the 4th of August, 1851.* Time was the essence of the contract. The court held default by the terms of the contract, time being specially made a consideration of the contract, classifying the case as a case where there had been imperfect performance, under the first subdivision of article 1911, C. C., as default "*By the terms of the Contract.*"

If the case of "Knight vs. Hernnes, Robinson, p. 277" exists, we are unable to find it by that title, but if it does exist, and if the district judge has correctly stated the doctrine, it is inapplicable to this case, for the defendants never "*acknowledged inability to comply with their contract:*" on the contrary, *did* carry and deliver the full 10,000 quarters of corn.

It is strange that *Nicholson vs. Dudley, 14 Ann. 81,* should have been cited by the district judge. He evidently did not read the case, but dealt with the syllabus or the Digest. That was not an action for refusal to perform a contract sought to be declared off by the plaintiff for non-performance, as in this case, but for *defective* performance of a contract to deliver a steam engine which *was delivered,* but turned out to have been constructed of poor material, whereby its value was impaired. Why this case should have been cited in a case of this character, is not easily comprehended. It is clear that the district judge recognized the necessity of actual putting in default before a commutative contract could be declared off for non-performance, but did not distinguish between a contract imperfectly performed and the absolute non-performance that both he and the circuit judge adjudged in this case.

The rule of measure of damages in Louisiana for breach of contract is that the damages which are incidental to, and caused by, the breach, that may reasonably supposed to have been con-

templated by the parties at the time of the contract, may be recovered, but damages for supposed profits, remote and speculative in character, cannot be allowed. The damages, *at the time* of the default, are the only damages that can be recovered.

Vane vs. Tourne, 13 La. 229.
Williams vs. Burton, 13 La. 410.
Gobet vs. Municipality No. One, 11 Ann. 300.
Glover vs. McAllister, 2 Rob. 161.
Wilkins vs. Bassett, 12 Rob. 28.
Arrowsmith vs. Jordan, 3 Ann. 105.
Marchesseau vs. Chaffee, 4 Ann. 25.
Denera vs. Bisa, 6 Ann. 365.
Grant vs. McDonogh, 7 Ann. 447.
Reeding vs. Donovan, 6 Ann. 491.
Thompson vs. Hawes, 14 Ann. 45.
Roberts vs. Powers, 15 Ann. 187.
McClure vs. King, 15 Ann. 220.
Bohn vs. Cleaver, 25 Ann. 420.
Campbell vs. Miltenberger, 26 Ann. 72.

The doctrine of these cases is, that where there is a breach of contract for the delivery of merchandise, the measure of damages is the difference between the contract price and the market price *at the date of default.*

If the court will examine the telegraphic order upon which the attachment process was issued (printed record, p. 10), it will find that the order was issued in a case of "*Forestier & Co. against owners of the Deronda.*" This order, and changes made in the written libel as filed, show that it was first contemplated to sue in the name of *Forestier & Co.*, on *their* charter-party. Why this scheme was abandoned is evident, for it is pretended that the price of corn of the grade involved had *fallen in the market between the date of the contract, June 7, 1883, the date when it is alleged, there was default on June 30, 1883*, hence, Forestier & Co.

had escaped a bad bargain by the alleged default, and instead of being damaged by the default, they had *profited* by it to the extent of the fall in price, therefore, could not make a case of damages against the ship. By the jugglery of change of parties a decree for over $24,000 00 damages, interest and cost was obtained. Law ought not to encourage such brilliant tactics, or rather tactics with such brilliant results to the strategists.

That the measure of damages for passive breach of contract is the same in Louisiana and the common law, would seem to established by the statement of the rule in Louisiana, yet there is authority in the reports of the Louisiana courts for the similarity. It is so understood by the supreme court of Louisiana. In the case of *Goodloe vs. Rogers*, twice before the court, reported in *9 Ann. 273*, and again in *10 Ann. 631*, the court held that there was no material difference in the law of measure of damages in the civil and common law, and that the rule as to consequential, proximate and remote damages, is the same, with no difference in the rule of pleadings or evidence.

Unless the rule in *Watts vs. Camors* excludes the local law of damages, where the action is for breach of charter-party contract, pending in admiralty, the rule in Louisiana disposes of the decree in this cause by demonstration. The court, if it applied any rule in measuring damages, did not apply the correct law, even if it is a case where any damage should have been measured or decreed, and therefore the decree should be reversed.

Even if this court should find any cause of action, there is no material or finding of facts in the record by which this court can reach or decree any measure of damages. The proper data is not here.

The federal courts have so often announced the general rule concerning damages, consequential, proximate and remote, that it seems idle to cite authorities. It may be difficult to rec-

oncile some of the cases with each other, or with any general rule; yet whenever the general rule has been stated, it has always been uniform.

The measure of damages against vendors for non-delivery of goods is the difference between the price or value of the article as fixed by contract and the fair market value *at the time of default.* Anticipated profits are not recoverable.

Bazin vs. Steamship Co., 5 Am. L. R. 459.
The Gold Hunter, 1 Bl. & H. 300.
The Joseph Barker, 1 Ab. 215.
The Col. Ledyard, 1 Sprague.
Douglas vs. McAllister, 3 Cranch, 298.
Shepherd vs. Hampton, 3 Wheat. 109.
Marsh vs. McPherson, 105 U. S. 709.
Brown vs. McGrau, 14 Pet. 479.
London vs. Taxing District, 104 U. S. 771.
Fowler vs. Merril, 11 How. 375.
Swift vs. Burnes, 16 Pick. 196.
Bartlett vs. Blanchard, 13 Gray, 429.
Shaw vs. Nudd, 8 Pick. 9.
Essex Co. vs. Pacific Mills, 14 Allen, 389.
Hamer vs. Hathaway, 33 Cal. 117.
Douglas vs. Kraft, 9 Cal. 562.
Crosby vs. Wilkins, 4 Cal. 411.
Pelberry vs. Gorham, 33 Cal. 349.

This rule is uniform in all of the states, and cases declaring the doctrine could be cited without practical limit as to number.

The libellants seem to hinge their claim for damages upon the fact that a cargo of staple agricultural product was not delivered to or accepted by Forestier & Co. Therefore, there is no question of "particular use" to which the merchandise alleged to have non-delivery was to be put. Ten thousand quar-

ters of *any other corn* of the same grade would have filled the demand of *Forestier & Co.* We have, for this reason, cited no authorities on the question of "particular use," which, under some circumstances, may vary the rule as given above.

As Gomila & Co. were dealing with a vendee in New Orleans, for delivery *in New Orleans*, there is no question of any profit that Gomila & Co. could have made in any foreign market. Forestier & Co.'s losses, if any, are not at issue here.

Tested by the law governing the measure of damages, both in Louisiana and elsewhere, it is incomprehensible how the circuit court found any warrant for condemning the appellants to pay the items stated in the seventeenth finding and upon which the decree for damages is based, even if the extraordinary error of the court in the construction of the charter-party is overlooked.

The seventeenth finding is nothing but error, both of law and fact, when tested by the law and the other special findings.

We have considered the case on the question of damages as if *Gomila & Co.* were the charterers, and the surrender of their charter-party and the execution of the new contract to *Forestier & Co.* had no effect in law, either upon the rights of the owners of the ship or upon the contract relation of Gomila & Co. to the ship.

We do not for a moment abandon our position, that at the time of the alleged default and at the time of the commencement of this action, *Gomila & Co. held no contract relation to the ship as charterers*, and that there had been delivery to and an acceptance by *Forestier & Co.* of the cargo sold to Forestier & Co., on the 29th day of June, and that *Forestier & Co.* were not in a position to declare the contract off to the prejudice of the ship from the moment that they became charterers of the ship and, as they pretend, took a "harbor insurance" risk on the cargo, (the premium for which we are condemned to pay by the decree

in this case.) And we, at all times, insist that under the only lawful construction that can be given to the charter-party contract to *Forestier & Co., or Gomila & Co.*, the ship fulfilled all of its covenants and made no default. That if there was any delay it resulted from the act of the charterers in the unskillful or fraudulent stowage of *their own cargo by their own servants*, their pretended stevedores.

The discussion of measure of damages was probably uncalled for, as it seems impossible that the pleadings and findings of fact can be held to disclose any cause of action against the appellants, in *Gomila & Co.*, or sustain any decree in their favor. Our apology for the discussion is, that the counsel for appellants have been surprised by the action of two courts that have dealt out to them damages on a most liberal scale.

We have dealt with only that portion of the case assigned to us. Other counsel will deal with the assignments of errors not dealt with in this brief.

We believe all the assignments well taken, and respectfully submit that the decree of the circuit court should not only be reversed but, Gomila & Co.'s libel dismissed, because it appears not only that they *were not the charterers*, but that the appellants have, in all things according to the terms of the contract, performed and fulfilled the only charter-party relating to either the voyage or cargo in question, to the party to whom they were bound in law, as they were bound in law.

All of which is respectfully submitted,

J. R. BECKWITH,
Counsel for Appellants.

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Supreme Court of the United States

OCTOBER TERM, 1888.

No. 33.

J. H. W. CULLIFORD AND JNO. S. CLARK, CO-PARTNERS AS CULLIFORD & CLARK, ET AL., *Appellants,*

versus

A. J. GOMILA AND LARNED TORREY, COMPOSING THE FIRM OF GOMILA & CO.

BRIEF AND ASSIGNMENTS OF ERROR IN BEHALF OF CULLIFORD & CLARK, APPELLANTS.

J. McCONNELL,
Of Counsel for Culliford & Clark, *Appellants.*

A. W. Hyatt, Stationer and Printer, 73 Camp Street, New Orleans.—42814.

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versus

A. J. GOMILA AND LARNED TORREY, COMPOSING THE FIRM OF GOMILA & CO.

BRIEF AND ASSIGNMENTS OF ERROR IN BEHALF OF CULLIFORD & CLARK, APPELLANTS.

STATEMENT OF THE CASE.

On the 18th of June, 1883, the British steamship Deronda arrived in the port of New Orleans with a cargo of fruit and salt. Two days before her arrival, the libellants, Gomila & Co., had opened negotiations with DeWolf & Hammond, the New Orleans agents of the steamer, for a charter-party, and as a result, the agents had cabled the owners, "she (the steamer) must be guaranteed to carry not less than 10,000 quarters; *charterers to have power of cancelling charter-party if vessel is not ready to load cargo by 25th of June.*" On the 18th of June, the captain and agent called at libellants' office, and after consultation, Gomila advised that a cable message be sent the

owners, as follows: "The vessel will carry 10,000 quarters of grain if we coal at Halifax."

On the 19th of June, a contract of charter-party, for the carriage of grain from the port of New Orleans to Europe, was concluded and signed, which contained the following stipulation: "*Steamer is guaranteed to carry not less than 10,000 quarters of 480 lbs.*" (R. p. 7).

On the 28th of June the loading was commenced without any formal tender of the steamer. After the loading had begun, Gomila & Co. handed, unindorsed, their copy of the charter-party to Forestier & Co., their vendees of the cargo then being loaded on the ship. Forestier & Co. surrendered this charter to the agents of the ship, and procured from them a new charter in their own name. Gomila & Co., when afterward informed of this transfer, replied, they would not object to such a change if the ship fulfilled the guarantee in the charter.

On the 30th of June, the steamer having taken on board only 9,635 quarters, "the loading was stopped and the ship was declared by the underwriters' inspector to be *full all over.*" "*The ship could take no more with safety,* AS SHE WAS THEN "LOADED AND STOWED."

On the 5th of July, Forestier & Co., the vendees of Gomila & Co., notified them that they refused the cargo because it was short.

July 7th, the libellants caused the cargo to be sold at public auction, against the repeated protests of the ship.

On the 13th of July, the stowage of the Deronda having been re-arranged, enough more grain was taken aboard to make over 10,000 quarters, with which the ship sailed on July 18th for her original destination, and there safely arrived and delivered her cargo.

From this statement of conceded facts, it is manifest, that the ship complied with the guarantee, as it was expressed in the terms of the charter-party. But, although the contract of char-

ter-party is silent on the subject, and the libel makes no such allegation, the Circuit Court held, that the defendants were charged with full notice of the particulars of a certain grain contract which had been entered into by the libellants, with Forestier & Co., which fixed a time, to-wit, all of the month of June, within which the loading should be completed, and solely because the loading was not completed within the time, specified in this grain contract, the defendants were condemned to pay damages in the sum of $23,993 76, the greater portion of which were occasioned by the SALE AT AUCTION and consequent sacrifice of the cargo, which was as unnecessary, as it was unwarranted and illegal.

There are certain facts of great importance to a correct understanding and decision of this case, which were found by the Court to be "correct and true" and "made findings of fact" at request of defendants' counsel, but were disregarded by the Court, on the sole ground, that "the pleadings presented no issue, under which said facts could be considered as legal evidence."

The error of this ruling will be fully shown hereafter. Viewed now as being relevant and admissible, these facts, which are in proper form, as "findings of fact" and declared by the Court to be "correct and true," taken in connection with the other findings of fact, made by the Court, and the pleadings herein, conclusively and clearly show as follows, *to-wit:*

That this ship WAS LOADED *by the libellants, Gomila & Co.;*

That the parties actually employed by Gomila & Co. to load the ship, were *not regular nor competent stevedores;*

That the cargo was not properly stowed by them;

That the fact of the bad stowage of the cargo was not discovered by the defendants until after the 30th of June, when a portion of the cargo was broken out in order to get at the coal bunkers, by *a* REGULAR *stevedore* employed for that purpose by the captain of the vessel;

That by the terms of the charter-party, Gomila & Co. were required "to appoint *a stevedore* for loading said steamer at *current rates*," instead of doing which, they obtained *inferior stevedore labor at* CHEAP *rates;*

That Gomila & Co. deceived the ship as to the real character of their said employés, AS STEVEDORES, *by the rendition of a bill* for loading the vessel, *at nearly* DOUBLE THE PRICE *which they actually paid* their said employés *for loading the same;*

That by means of the deception so practiced on the ship in loading her by CHEAP *stevedore labor,* the libellants made the sum of ONE HUNDRED AND SEVENTY-TWO 50-100 DOLLARS;

That as soon as the *stowage was re-arranged* by a *regular and competent stevedore,* the ship received on board and transported abroad, as before stated, more than the quantity it had been guaranteed she could carry;

That there is not a line, in the findings of the Court, to show that the captain ever interfered, in any manner, with the loading of the steamer.

We have found it necessary to bring up the entire record in order to show error in several rulings of the Circuit Court, as we will endeavor to show upon the authority of the case of the Francis Wright, 105 U. S. 387, and other cases recently decided.

It will be observed that in estimating the damages a wide divergence is exhibited in the views and conclusions of the District and Circuit Court Judges. The District Judge awarding $9,360 97, R. 198. The Circuit Court increasing the amount to $23,993 76. It will be seen also that the principles of law upon which the two courts rested their conclusions as to the damages and the amount thereof are totally dissimilar, as we will hereafter show.

FIRST ASSIGNMENT OF ERRORS.

THE FIRST BILL OF EXCEPTIONS.

From this bill it appears, that the defendants requested the Court to make the following findings of fact, as material and ul-

timate facts, on which the correct determination of the cause depended, to-wit.:

1. That Gomila & Co. *charged, and collected*, the following bill FOR LOADING *said steamship*, to-wit:

NEW ORLEANS, June 30, 1883.

SS. Deronda, to Relief Elevator No.—— Dr.

For loading 67,001, 44-56 bus. bulk corn, at $1 75 per cwt.	$117 25
For sacking and sewing 15,586, 14-56 bus. in sacks, 1½ per bus.	223 79
For stowing 5,785 sacks, at 3 cts. per sack	173 55
	$524 59

Gomila & Co. *paid their employés*, Alfred and Neeb, the following bill FOR LOADING *said steamship:*

NEW ORLEANS, June 30, 1883.

Messrs. Gomila & Co., to A——, Neeb, Dr

SS. Deronda.

To trimming 67,001 bus. corn, trimming $1 25	$ 83 75
To sacking and sewing 15,586, at ¾	116 88
To stowing 5,785 sacks, at 2 cts.	130 16
To extra labor, night work	21 30
	$352 09

2. Alfred and Neeb were NOT REGULAR STEVEDORES. Alfred was A CLERK in the employ of Gomila & Co., and AS SUCH *had charge of their grain elevator* operated by their employés, and used by them IN LOADING *the steamship*. Alfred had been, since April, 1883, superintendent and weighmaster on one of Gomila & Co.'s grain elevators. Prior to that he had been traveling for a St. Louis house, and also for a New Orleans house, in the *stationery* business. *He did not call himself* A PRACTICAL STEVEDORE. Neeb was *not a regular stevedore*, but

worked in grain trimming and grain sacking. He was a grain stevedore and had been engaged in that business about fourteen years. *He had also* A BAR-ROOM and *grocery* in the city, which HE KEPT HIMSELF, and had kept for ten or twenty years past.

3. On the —— day of July, 1883, the captain of the ship employed John Beattie, A REGULAR STEVEDORE, to break out a portion of the cargo in the between decks, to get at the coal bunkers, and, in doing so, John Beattie testified that "*he found that cargo had not been properly stowed.* OTHER EVIDENCE TENDED TO SHOW THAT THE CARGO HAD NOT BEEN PROPERLY STOWED."

And thereupon the Court ruled as follows: "*That the several findings of fact,* AS ABOVE STATED, *were* CORRECT AND TRUE, but that while MAKING SAID FINDINGS OF FACT, at the request of defendants' counsel, *the Court had disregarded the same and given no legal effect thereto,* BECAUSE *the pleadings presented no issue under which the said facts could be considered as legal evidence.*"

Before adverting to the importance of the several facts thus formally found by the court as "correct and true," let us first examine the reasons assigned by the Circuit Court for denying the defendants any and all legal benefit therefrom. The sole ground, as stated in the bill was, "*because the pleadings presented no issue under which the said facts could be considered as legal evidence.*"

To this we answer:

(*a*) This testimony was admissible under the pleadings strictly construed, because the libel, Art. 4, alleged "that the libellants had well and truly performed and kept all the covenants and undertakings on their part in said charter-party to be performed and kept." R. p. 3. And the defendants in their answer, in Articles 1 and 5, had formally traversed and denied

all and singular, the allegations of the articles of the libel, enumerating said articles severally.

The fourth article of the charter-party stipulated, the "stevedore for loading said steamer to be appointed by charterers * * * at current rates for such labor." The allegations in the libel and denials in the answer, above quoted, necessarily made the issue, whether libellants had performed this part of their undertaking, and also whether they had "*well and truly*" performed it. The evidence excluded by the court bears directly on these issues, and shows that libellants violated their contract obligation in the most important particular, to-wit: The loading of the ship by procuring *cheap* stevedore labor at *half rates*, instead of a stevedore at *current* rates.

Again, in article second, the very question itself of the good or bad stowage of the cargo is made; after reciting the quantity taken on board, the allegation is as follows: "It was, in fact, IMPOSSIBLE *to* PROPERLY STOW upon or *into said vessel, any greater quantity, etc.* This allegation being denied, by the answer made, distinctly and directly, the issue whether the cargo so put in, was or not properly stowed and, therefore, possible or impossible to carry more.

(*b.*) The Court erred in disregarding as evidence the facts thus found as correct and true, because at the trial, the testimony had been offered and received in evidence without objection by counsel. And for the Court, subsequently to supply such objection in the judgment, after the time of offering and trial had passed by, without such objection being made by counsel, would operate a grave hardship upon the defendants.

(*c.*) The Court erred in the application of the rule as to strictness in pleading, particularly in this, that while the rule was rigidly enforced against defendants, it was relaxed as to the libellants. Numerous facts were found and conclusions of law made by the Court in favor of the libellants, upon matters

not set forth in the libel in any manner, and in regard to which no issue was made in the pleadings.

For example—

There are no allegations in the libel either as to the time when, or within which, the contract sued on was to be performed; or, that Gomila's sale of grain, was for June delivery; no allegation that defendants had notice or even knowledge of the grain contract, or of any of its particulars; no allegation that the ship was ever *tendered* to the libellants, or that the defendants were ever put *in mora*, or that they ever made *waiver* of default; and yet on all these important points findings, or conclusions, were made by the Court.

If the rule that the *allegata and probata* must agree, is to be enforced against the defendants, we ask that at least, it be enforced in like manner against the libellants, in which event, we have no fear of the result as the libel, for lack of any allegation upon the essential matters above enumerated, presents upon its face, no valid or legal cause of action against these defendants, as we will hereafter more fully show.

If the libellants are to enjoy the latitude, we have shown has been extended to them, as to proof of facts not alleged in the pleadings to have occurred, then similar latitude should be shown their adversaries in the same case.

(*d.*) Certainly, the facts found by the Court are admissible as evidence *in rebuttal*, under the circumstances above stated.

(*e.*) The court clearly erred in disregarding the facts as found for another reason, the consideration of which alone, justifies the admission of the evidence. In cases of this character, *sounding in damages*, the rule is, that evidence of matters IN MITIGATION OF DAMAGES is always admissible WITHOUT BEING PLEADED.

Southerland on Damages, V. 1, pp. 257, 258.

2 M. & W. 758; Nicholls vs. Williams, 36 Md. 301; 16 Vermont, 9.

In the case of McKyring vs. Bull, 16 N. Y. 297, 304, Judge Seldon, as the organ of the Court, said: "As the code contains no express rule on the subject of mitigation, except in a single class of actions, this question cannot be properly determined without a recurrence to the principles of the common law. By these principles, defendants in actions, sounding in damages, were permitted to give in evidence, in mitigation, not only matters having a tendency to reduce the amount of plaintiffs' claim, but in many cases, facts showing that the plaintiffs had, in truth, no claim whatever."

(*f.*) There are no technical rules of pleading in admiralty as at common law.

19 Howard, 162, Dupont de Nemours & Co. vs. Vance et al.

20 Fed. Rep. 923.

33 Fed. Rep. 552.

(*g.*) *Where the pleadings are not sufficiently specific, and should have been amended, yet the Court will give effect to the case when the evidence (here the findings) shows the* REAL FACTS, *and the parties are* NOT TAKEN BY SURPRISE.

12 Wall. 167, 173, The Steamer Syracuse.

9 Wall. 670, The Quickstep.

2 Curtis, 363, The Clement.

19 Howard, 172, Dupont de Nemours & Co. vs. Vance & Co.

The Wm. Penn, 3 Wash. R. 484.

In the case of the "Clement," above cited, Judge Curtis referred to the case of the Lady Anne, 1 Eng. Law and Eq. 674 and quoted from Dr. Lushington's decision therein, the declaration, that "the very point on which a case of collision hinged, had never been touched upon at all, *in the pleadings.*"

See also,

Henry on Admiralty Jurisdiction and Practice, p. 317, § 113.

Assuming, then, that, for the reasons we have adduced and the authorities we have cited, the defendants must be allowed the benefit of the facts so found by the Court, we beg in this connection briefly to explain, the application and value of these facts, as showing error in the decree appealed from.

The judgment appealed from, rests—not on the fact that the ship was unable to carry 10,000 quarters of grain, the guarantee mentioned in the charter-party—but, because she failed to receive that quantity on board on the 30th day of June, the *time* specified in Gomila's grain contract.

It is seen, from the sixth finding of the Court, that on the 30th of June the ship was "full all over," and could take no more with safety "AS *she was* THEN LOADED AND STOWED."

We repeat the quotation from the finding, to give it emphasis: "AS she was THEN *loaded* and *stowed.*"

The loading and stowing, as *then* done, was the work exclusively of Gomila & Co., through their own employés, and the loading and stowing *then* done was, by *this* finding of the Court, as it was by the disregarded findings, clearly shown to be the cause of the failure of the ship to *then* receive the guaranteed quantity of 10,000 quarters.

Let us for a moment analyse, carefully and *seriatim*, the several facts so found by the Court to be correct and true, but disregarded as evidence under the pleadings, as they conclusively refute the libellants' pretensions.

First. The important fact is found that Gomila & Co. "LOADED" the steamship. Because, the finding is, that THEY made a charge and collected a bill "FOR LOADING *said steamship.*"

Second. It is found as a fact that the loading of the steamship was performed for Gomila & Co. by *their employés*, Alfred and Neeb.

Third. It is found as a fact, that Gomila & Co. paid their employés, Alfred and Neeb "for loading said steamship," a

bill dated June 30th, 1883, for *only* $352 09; and that on the very same day, as appears from its date, Gomila & Co. rendered a bill to the ship for the same work, identical even as to items (except as to one small item of $21 30), and *increased the amount of each of these items* until the aggregate amount was swelled to the sum of $524 59 "FOR LOADING *said steamship.*"

It is quite evident, therefore, that Gomila & Co., in the account they rendered the ship, designedly made it *appear* that they had fulfilled to the letter their undertaking in the charter-party, that the stevedore appointed by them should be such as to require payment at "*current rates*" for his labor, because in it they charged full rates. But it is equally evident, from an inspection of the bill rendered and *paid* to Alfred and Neeb by Gomila & Co., that the loading was procured at *cheap* or half rates.

As the bill of Gomila & Co., for loading the ship, is dated June 30, 1883, and it is found as a fact that they collected it, the legal and necessary presumption is that they collected it *on that day.* Therefore, on that day Gomila & Co. *represented* by their own charge to the ship, *that the loading had been performed by competent stevedores,* when *they knew the contrary,* as we will in the next paragraph more fully show.

Fourth. The next fact, so found by the Court, relates to the character of Alfred and Neeb *as stevedores.* It is incredible to believe that large grain dealers, as Gomila & Co. are represented to have been, could have the temerity to undertake the *loading* of ships through the agency of such employés as these men are shown to have been by this finding.

They were "*not regular stevedores.*" Alfred was "*a clerk* in the employ of Gomila & Co., and *as such had charge* of their grain elevator," etc. "For the period of about two months he had been superintendent and weighmaster on one of Gomila & Co.'s grain elevators." Prior to that he had been a *drummer.* "He did not call himself a *practical stevedore.*"

We submit, then, that if Alfred was neither a regular stevedore nor a practical stevedore, the conclusion from the finding must fairly be, that he was an "irregular" and "impractical" kind of a stevedore, a character clearly unsuited to discharge properly the important and responsible duties of a regular and skilled stevedore.

Bad, however, as Alfred was, he was certainly the better one of the two *stevedores* employed by Gomila & Co. to load this ship, if we compare their "points" as set forth in the said finding of the Court. Because Neeb, the other employé, although he had had some experience as a grain stevedore, was "not *a regular stevedore.*" He had, however, *another* occupation *to which he gave his personal attention*, and had done so for years, which was incompatible with the duties of honest stevedoring *at the same time.* As the finding expresses it, "He had *also* A BARROOM and grocery in the city, whith HE KEPT HIMSELF and HAD KEPT *for ten or twenty years past.*" Now, if Neeb kept the barroom and grocery *himself*, how could he give, at the same time, the personal attention necessary to load a steamer as stevedore! Such are the characters of the two *stevedores* employed by Gomila & Co. to load this ship. No wonder they obtained the services of *such* stevedores at cheap rates.

As the finding shows that these men were the "employés" of Gomila & Co., the latter will find it a vain work, to plead ignorance of their unfitness to perform the functions and duties of "regular" stevedores, such as the ship was clearly and fairly entitled to have.

On the other hand, the captain of this foreign ship being in a strange port, will be presumed to be ignorant of the true character of men pretending to act as stevedores, and of course had to rely on the charterers when apparently discharging their contract undertaking, to appoint a stevedore, for loading the steamer,—that they would act in good faith, and *as they aver in the libel* they did, as to all their covenants, "*well and truly*" perform *that* obligation.

Fifth. The next and last fact so found by the Court shows, that subsequently to the date when the employés of Gomila & Co. had failed in their work of loading as we have described—"the captain of the ship (who previously had evidently relied implicitly on the charterers) employed John Beattie, A REGULAR STEVEDORE, to break out a portion of the cargo in the between decks to get at the coal bunkers, and, in doing so, John Beattie testified that he found that the cargo *had not been properly stowed.*" The Court also found that "*other* evidence tended to show that THE CARGO HAD NOT BEEN PROPERLY STOWED."

It was certainly only by "disregarding and giving no legal effect" to, the several facts so found by the Court "to be correct and true," that it was at all possible, we submit, to render a judgment for libellants for damages against the owners of this steamship.

SECOND ASSIGNMENT OF ERRORS.

THE SECOND BILL OF EXCEPTIONS.

From this bill it appears, that the defendants objected to certain findings and to portions and parts of findings, several of which objections, in view of the decisions recently rendered by this Court, we consider untenable, and will not therefore refer to. With, however, the views of this Court before us, as expressed in the case of Merchants' Ins. Co. vs. Allen, 121 U. S. 67-72, showing clearly what rulings of the Circuit Court, in regard to findings of fact, may be excepted to and reviewed by this Court, we respectfully insist upon the following objections made in this bill, to-wit:

(*a.*) In finding No. eight, in saying "all parties had notice at once."

(*b.*) In finding No. twelve, in saying "a large quantity of coal and water."

(*c.*) The whole of findings fifteen, sixteen and seventeen.

The defendants "objected specifically that as to certain of

these facts thus found, and to portions thereof specified, there was *no evidence whatever* to support the same, and no issue made by the pleadings under which the same were admissible, or under which effect could legally be given to the same, the record and evidence in this connection being referred to and allowed as part of the bill. They also objected to certain of said findings of fact as being, properly speaking, conclusions of law. The Court ruled that "the evidence in the record specifically sustains each and every of the findings of fact in the matters to which objection is made,, and overruled the said objections.

We propose briefly to refer to the items of objection above mentioned, and to particularize, in regard to each, wherein the ruling of the Court was erroneous.

First. In regard to the statement in finding No. eight, "all parties had notice at once," we submit that not only is there not a particle of evidence in the record of any *notice* having been given, by any party, to any other party, but the declaration is manifestly an opinion, or *conclusion of law.* We submit further, that if the statement is to be considered as a conclusion of law, then it is erroneous, because unsupported by the findings of fact.

Second. In regard to the expression in finding number twelve, "A LARGE QUANTITY of coal and water," our objection is, that *no evidence whatever* had been introduced to prove the same. A few observations are necessary to show the materiality of this statement as being one of the material and ultimate facts upon which the determination of the case depended, so far at least as related to the judgment that was rendered by the Circuit Court. In the view of that Court, it is quite evident that a material and ultimate fact upon which the determination of the cause depended was, *not* whether "*water and coal*" simply were discharged, as well as a partial re-stowing of the cargo made, subsequently to the 30th of June, in order to enable the ship to take in the remainder of her cargo, but whether the amount was a "large quantity." It was only when magnified into a "*large*

quantity," that the expression assumed importance as being probably an "ultimate fact." The only piece of evidence in the record on this subject, was and is, the certificate of the marine surveyors, to be found in the Record, p. 46.

The marine surveyors, after referring to the certificate given by them for the previous loading, completed on the 30th of June, used these words in their certificate, "since which time the cargo has been partly broken out and re stowed, and the ship lightened by discharge of *coal and water* from water ballast tanks."

If there was any other evidence or conflict of testimony on the subject, we admit the matter would not be subject to review. It is only because the words "*large quantity*" make the fact material and are entirely unsupported by any evidence whatever, and because the statement thus made might be viewed by this Court as a "material fact," that we have made and insist on our exceptions. Our objection in this connection is pointed rather to the *water* that was taken out being represented as a "large quantity." Fortunately, as to the *coal*, there are expressions in other findings of fact as made by the Court which necessarily negative the force of the statement that a "large quantity" of *coal* was taken out, which *implied* that the ship had entirely too much coal on board for her voyage. For instance, in the telegram cited by the Court in the eighth finding, quoted as sent by the agents of the ship in stating the condition of the vessel, as she was, just after the loading of the 30th of June was completed, we read, that the steamer, besides her cargo, had on board 170 tons of coal. That this was *a much less quantity* of coal than the vessel had previously required and taken, when carrying 10,253 quarters of grain from the port of New Orleans for Europe—we have only to turn to the fourteenth finding of the Court. There we read, "That the carrying capacity of the Deronda for grain, on voyages from New Orleans to Europe, when properly fitted out, was over 10,000 quarters, and she had on a

previous voyage, with *two hundred and twenty-four tons of coal* in her bunkers, carried safely a cargo of 10,253 quarters of grain." The fair deduction from these two findings as to the quantity of coal, negatives the idea that any "large quantity" of coal was taken out, otherwise the vessel would not have had a sufficient quantity to prosecute so long a voyage. As to the water, we repeat, there is not within the compass of the record a single line or expression on the subject of the *quantity* of the water taken out of the water tanks, except what we have quoted above from the certificate of the marine surveyors. We challenge the examination of the record for disproof of this statement.

There are other views of the case to be presented in another connection, in which the importance of this objection will become manifest, and we therefore respectfully urge that the error in using the expression "large quantity" in the twelfth finding of fact, be corrected by striking out these words.

Third. We objected to the whole of findings Numbers fifteen and sixteen, on the ground that "there was no issue made by the pleadings under which evidence to prove the same was admissible, or under which effect could legally be given to the same."

The libel makes no allegation such as, that corn was a perishable article, or, especially so, when in a vessel and under decks, exposed to a July sun. In regard to the sale, the libel does allege that the libellants were "obliged to have said cargo sold," and that the same "*was done* at public auction," but it does not allege that the auction sale was "*necessary or proper.*"

The libel tendered no issue as to the *necessity* of the sale AT AUCTION, and yet the finding determines as *a fact* that the sale at auction was necessary and proper. The cargo was simply *sacrificed* at the auction sale, which was made in the face of repeated protests from the ship (see finding 11). The District Court refused to approve this unwarranted sacrifice, holding

that "he (Gomila), was not justified in permitting a sale at lower terms than the evidence shows were the ruling terms."

See opinion of Judge Billings, R. p. 198.

The Circuit Judge, on the other hand, in the absence of any allegation for its necessity, approves the auction sale, and makes it the *basis* for adjudging the defendants to pay so large a sum in damages as $20,549 39.

We respectfully submit, as further error on the part of the Court in respect to the matter now under consideration, that the question whether the sale *at auction*, indeed, whether any sale at all, under the circumstances, was *necessary*, was and is properly, *a conclusion of law*, and its being classed under the findings of fact, cannot deprive this Court of its right and duty to review the question precisely as if it had been termed a conclusion of law, and we submit the same remark in regard to the whole of the three findings, numbers fifteen, sixteen and seventeen. The last, number seventeen, finds as *a fact*, that the libellants' damages amounted to $23,993 76. It is too well settled by the decisions we have already quoted, that the amount to be adjudged is necessarily a question or conclusion of law, at all times subject to review by this Court.

We submit, therefore, that numbers fifteen, sixteen and seventeen being erroneously placed as findings of fact, are to be treated as conclusions of law, subject to review, and upon due consideration be rejected or disregarded.

THIRD ASSIGNMENT OF ERRORS.

THE THIRD BILL OF EXCEPTIONS.

For the reasons already mentioned, we omit several of the objections stated in this bill, and proceed at once to consider those only, which are tenable under the more recent decisions of this Court.

In this bill, in item No. 3, we requested the Court to find, that "there was *no tender* of the steamer for loading, at any time

prior to the 30th of June," and in item No. 4, we asked the Court to find, that "there was no tender of the steamer to the charterers on the 30th day of June, as being fully loaded ; and no statement or admission was then made to the charterers, by the owners, or by any one authorized to represent them, that the steamer either could not, or would not, carry the full quantity of grain guaranteed by the terms of the charter-party."

In item No. 6, we requested the Court to find that Stekkebrye & Hiralsoe, of Copenhagen, were the parties to whom Forestier & Co. had engaged to ship the grain originally. The same cargo as finally taken, was sold and shipped by Forestier & Co. to, and received by, the said Stekkebrye & Hiralsoe, at the price of $50,067 65."

The Court refused to make the findings as requested.

"1. Because application to find them comes after the finding of facts entered by the Court, and the matters referred to are not embraced in the original findings as requested by the defendants."

"2. Because, so far as the requested matters are facts, and are material to the issues between the parties, they are included in the facts already found."

"3. Because the matters referred to are not shown by counsel to be material to the issues between the parties, but are merely so alleged."

(Nos. 4, 5 and 7 are omitted, because they refer to objections which, as above stated, we have not insisted on.)

"6. Because Nos. 3 and 4 are conclusions of law, and if correct at all, are to be drawn from the facts as already sufficiently found."

"8. Because, as to No. 6, the requested finding is not clear under the evidence, there being evidence to show, that the price paid by Stekkebrye & Hiralsoe to Forestier & Co. for the cargo finally delivered, was some $7,500 less than the price named,

and the Court is unable to say, from the evidence, what the real price was."

It will be observed, that the findings requested by us above, under the items numbered 3 and 4, both of which refer to the alleged *tender* of the ship, one at the commencement of the loading and the other at the ending of the loading on the 30th of June, were by the Court, in its ruling above, No. 6, declared to be *conclusions of law*, the language of the Court being, "Nos. 3 and 4 are conclusions of law." We shall, *therefore*, in another connection, discuss the question raised in Nos. 3 and 4, and especially that of the *tender* of the ship, as *conclusions of law*, and show the *insufficiency* of the facts found to support the conclusions.

Referring to the item, No. 8, in this bill, R. p. 233, at top, there was error, because it certainly was the duty of the Court to find, as a fact, from the evidence, what the price was that was paid to Forestier & Co. for the cargo when finally sent to Europe, and delivered to Stekkebrye & Hiralsoe, the parties to whom Forestier had engaged to ship the grain originally. We affirmed that the evidence showed the price to be $50,067 65.

We respectfully submit that it was incumbent upon the Court to weigh all the evidence upon the question, and then *decide affirmatively* what the price was, and that in not doing so the Court erred.

The general ruling made by the Court in this bill and repeated in another bill, to-wit: "That the application comes after the finding of facts entered by the Court," and because "the matters referred to are not embraced in the original findings as requested by the defendants," we submit is not only untenable, but if permitted to stand as the rule of practice, would be a serious detriment to litigants who, in taking appeals, were endeavoring, in good faith, to get the actual facts before this tribunal. In our humble opinion, the law that deprives this Court of an inspection of the record to learn the true facts of a case is

harsh enough upon litigants. It would become intolerable indeed, if, in practice, fair and full latitude is denied to bring before the appellate tribunal any and all material facts as shown by the evidence.

FOURTH ASSIGNMENT OF ERRORS.

THE FOURTH BILL OF EXCEPTIONS.

In this bill (R. p. 233) we objected to the filing in the record of a paper entitled, "by the Court in explanation," on the ground, that the same was not either "a finding of fact" nor a "conclusion of law," either in whole or in part.

We objected, and reserved the bill for protection against any implied acquiesence in the contents of this paper.

The law and rules of procedure under which causes in admiralty are tried, authorize three things: the finding of the facts, the conclusion of law, and, lastly, the decree. We submit that the "explanation" objected to by us can be considered and treated only, as an "opinion" in any suit would be. We respectfully ask that our objection shall protect us against the statements in this "explanation" being used against us in any other way.

FIFTH ASSIGNMENT OF ERRORS.

THE FIFTH BILL OF EXCEPTIONS.

In this bill (R. p. 233–234) we asked the Court to find as a fact, (1) a certain letter written on July 5th, 1883, by E. Forestier & Co. to DeWolf & Hammond, agents of the SS. Deronda; also to find (2) that "when the loading was begun on June 28th, the steamship had on board two hundred and five tons of coal as fuel. Subsequently seventy-one tons of the coal was taken out, leaving only one hundred and forty (*Note*, should be one hundred and thirty-four) tons of coal for fuel on board when she left port."

We submit that the objections stated in refusing the findings asked are untenable, if we show, as we will do in another

connection, that the facts mentioned were material, having direct relation to ultimate facts, upon which the determination of the cause depended.

The Circuit Judge held, that these facts were not *material*, and yet we contend that this letter of Forestier & Co. shows that on the 5th of July they were still the real transferrees of the charter-party, and the second finding asked would have placed clearly before this Court the important fact that the SS. Deronda was not negligently overloaded with coal, when the loading began on the 28th, because, according to the fourteenth finding made by the Court, the steamer had on a previous occasion used a larger quantity of coal, to-wit, two hundred and twenty-four tons, when she carried 10,253 quarters of grain.

SIXTH ASSIGNMENT OF ERRORS.

The Court erred in the conclusion of law, touching the TENDER *of the ship for loading, because no formal tender was ever made; and in condemning the defendants in damages, without allegation, or proof, of a default, or waiver of default.*

A careful perusal of the several findings of fact, in which the subject of the *tender* of the ship for loading is mentioned, fails to show that the ship was ever formally tendered, for loading, at any time—certainly not on the 28th of June, the day that the loading was actually begun.

To be certain on this point, we will quote all that is said in the several findings on the subject of tender for loading.

In No. 6, the Court said: "On the 28th of June the ship was ready to receive cargo, and the loading then commenced. *No formal tender appears to have been made of the ship on that day,* but the loading was commenced with the consent of all concerned."

In finding number fourteen, the Court said: "The carrying capacity of the Deronda for grain on voyages from New Orleans to Europe, when properly fitted out, was over 10,000 quarters,

and she had on a previous voyage, with two hundred and twenty-four tons of coal in her bunkers, safely carried a cargo of 10,253 quarters of grain, but as she was fitted out and prepared and *tendered in the manner hereinbefore found, to Gomila & Co. on June 28*, 1883, she could not, etc."

In finding number seventeen, the Court said: "By the failure and inability of the steamer to receive, *when first tendered to Gomila & Co.*, a cargo of 10,000 quarters, they suffered loss as follows: etc."

Read together, it appears from these findings that no *formal tender* was ever made; but that "on the 28th of June" "the loading was commenced" "with the consent of all concerned."

Finding number six declares there was *no formal tender on the 28th of June*, and there is no pretense of tender on *any other date*. Therefore, the findings fail to fix a date when *formal tender* was made. In other words, the findings show there was no formal tender, at any time.

In the above described condition of the findings as to the important question whether the ship had ever been formally *tendered* for loading or not at any time, which we were confident had never been done, we (as already shown) excepted to the findings as made and asked the Court to find that "there was *no tender* of the steamer for loading at any time prior to the 30th of June." And at the same time we asked the Court to find as a fact that "there was no tender of the steamer to the charterers on the 30th day of June as being fully loaded." See items 3 and 4 in bill of exception, R. p. 232. And the Court (see same page, item 6) in its ruling declared, that "Nos. 3 and 4 ARE CONCLUSIONS OF LAW, and IF *correct at all*, are to be drawn from the facts as already sufficiently found."

Now, if we turn to the conclusions of law as made by the Court, R. p. 226, we do not find it stated affirmatively that the steamer *was tendered*. The language is, "that under said charter-party the defendants were bound by their guaranty to see

that *when* the Deronda was tendered to the libellants for loading, that she was fitted, etc."

If the statement in the above conclusion of law, was intended to refer back to the tender as described in the findings of fact, then we repeat that the findings, when read in connection, fail to show any formal tender of the ship *for loading* on the 28th of June; and what is of great importance, as we will presently have occasion to show, no finding of fact shows that there was a *tender* of the ship AS BEING *loaded on the 30th day of June.*

We have quoted the language of the findings of the Court on this subject of the *tender* of the ship *for* loading, and we have drawn the attention of the Court to the absence from the findings of fact of any statement as to the *tender* of the ship AS being loaded on the 30th day of June, because of the importance of these points as to *tender*, or *default*, or waiver of default, as being a prerequisite to the recovery of damages where the violation of a contract is *passive* under the law of Louisiana, where the contract sued on in this case was made.

The importance of this subject and its application will more fully appear from a consideration of the *reasons* assigned by the Judge of the District Court for its judgment, as compared with the conclusions of law on the same subject made by the Circuit Court.

In the *latter*, as we have seen, the very foundation upon which the decree against the defendants is made to rest, or is intended so to be, either the fact or conclusion of law, (it is difficult to say which), is that there was a tender of the ship by the defendants to the libellants, *for loading*, (at some uncertain time) and that, because, *when so first tendered* (when was that?) she was not "fitted, prepared and arranged so as to be able to carry the 10,000 quarters, and therefore the libellants are entitled to claim damages."

Upon this principle as a basis, coupled with one other, to-

wit: That the defendants were charged in law with "full notice" of the grain contract, the decree of the Circuit Court rests.

The learned Judge of the District Court, as we have said, gave totally different reasons for his judgment, and what is most remarkable, as we will see, his reasons rest almost entirely, upon facts which are not to be found in the findings of fact made in this case.

In the opinion of the Judge of the District Court, as found in R. p. 195, we read: "There can be no doubt but that, if it ap-
" pears that, after an attempt to load the Deronda with 10,000
" quarters of grain, in accordance with the guaranty, *the owners*
" ADMITTED WITHOUT RESERVATION *their inability to place in her*
" no more than 9,635 quarters, *notified Gomila & Co. of that fact;*
" *that in consequence of such* UNRESERVED ADMISSION *and notifi-*
" *cation* Gomila & Co. *were induced to abandon their sale* to E.
" Forestier & Co., thereby retaining on their hands the grain,
" with the market price so conditioned that a heavy loss ensued,
" it would not be possible for the owners afterwards to revive
" the charter-party, except on the condition of being responsible
" for such loss. *This is just what the evidence shows.* And the
" principle of law which is to be controlling is not one exclu-
" sively of interpretation, but that where a contract is silent,
" *performance is tendered without reservation, which is* ADMITTED
" *to be defective*, and the obligee *acts* irreparably *upon such* AD-
" MITTED *non-performance*, the contract is violated and damages
" result. This is well settled as the law of Louisiana. The
" reasons given by the Court in numerous cases, that *a putting*
" *in default would be a vain thing.*"

It is perfectly clear that the judgment of the District Court rests upon the assumption as correct and true, of the following *facts* condensed from the above extract, to-wit:

1. That after an attempt to load the ship with 10,000 quarters, the owners ADMITTED, *without reservation*, their inability to place in her more than 9,635 quarters.

2. That the owners notified Gomila & Co. of this fact.

3. That *in consequence of* this *unreserved* ADMISSION *and notification*, Gomila & Co. abandoned their sale to Forestier & Co.

Not one of the facts above stated, appear in the findings of fact as made herein by the Circuit Court.

And it is quite certain they would have appeared in the findings of fact if they had been sustained by the evidence.

It is noticeable, however, that in Judge Billings' opinion it is said, that "THE CHARTERERS WERE TO LOAD THE VESSEL." See R. p. 192. It will be observed that the judgment of the District Court rests, as to the *facts*, mainly, upon an alleged *unreserved admission* by the defendants, *that they were unable to perform their contract*, and a *notification of that admission by them to the libellants*, and as to the *law*, upon *the consequence of such unreserved admission*, dispensing the libellants from the necessity, which otherwise existed, of putting the defendants in default, because the violation of the contract was *passive* merely.

It is quite clear the District Judge, could not logically or consistently have awarded damages, under the reasons stated by him, in the absence of the alleged *unreserved admission* of inability to perform, without proof being made of the putting *in mora* as a pre-requisite. Civil Code of La., Articles 1933 (1927), 1911 (1905).

Therefore, we submit, as a logical conclusion, that upon the finding of facts as made in the Circuit Court, the judgment of the District Judge would necessarily, from the reasoning in his opinion, have gone in favor of the defendants.

And equally clear does it seem, that upon the face of the findings of fact and conclusions of law, as made by his Honor, the Circuit Judge, it is equally impossible (if the District Judge is correct) to condemn the defendants in damages in this case, because it does not appear that the defendants were ever put in default, or ever admitted their inability to perform, or by any

act made a waiver, expressly or impliedly, of such legal prerequisite.

SEVENTH ASSIGNMENT OF ERRORS.

We assign as error, the rendition of the decree, or any judgment herein, against the defendants, on the face of the pleadings, and submit, as a matter of law, that the suit herein should have been dismissed, because the allegations contained in the libel set forth no valid or legal cause of action against the defendants.

(*a.*) The contract sued on, being made in Louisiana, must be interpreted in accordance with the laws and jurisprudence of that State, in certain essential particulars. For instance, in this case, the contract, if broken at all, was "violated PASSIVELY, by *not doing* what was covenanted to be done, or not doing it at the time or in the manner, stipulated or implied, from the nature of the contract."

Civil Code of La., Art. 1931 (1925).

"When the breach has been passive only, damages are due from the time that the debtor has been put in default, in the manner directed in this chapter."

C. C. Art. 1933 (1927).

"The debtor may be put in default in three different ways," as fully set forth in C. C. Art. 1911 (1905).

"When the suit is for damages for the *passive* violation of a contract *the petition must make a showing* that the defendant has been put in default. The allegation is essential, and the omission is not waived by a special defense."

"The default must be alleged in the petition, in order to show a cause of action."

Cross on Pleadings, p. 53, § 49, *verbo* "Default."

The case of McMaster and another vs. Brander and others is directly in point. It was a claim for damages under a contract of affreightment, where it was held: "Putting the defendant *in mora* is a condition precedent to the recovery of damages for a passive violation of a contract. Such damages

are only due after the debtor has been put in default, and the default *must be alleged* and proved; *nor can evidence be received to prove a demand*, WHERE IT HAS NOT BEEN ALLEGED IN THE PETITION."

See also, 3 An. 293, Hayden vs. Hertzinger.

13 La. 229, Vance vs. Tourne et al.

6 N. S. 229, Erwin vs. Fenwick.

Louque's Dig. p. 477 and 478.

There was, therefore, no valid cause of action on the face of the libel for want of an allegation that the defendants had been put *in mora;* or that default had been *waived*, or that the defendants had *admitted* they could not perform.

(*b.*) The libel is absolutely silent on the subject of the defendants having had any *notice or even knowledge* whatever, of the grain contract between Forestier and Gomila, or of its particulars. Such allegation certainly seems essential, to connect defendants with a matter of such grave responsibility, entirely outside of the charter-party contract.

(*c.*) The libel fails to state that the grain contract required the grain to be loaded by June 30th, or to mention any TIME whatever for the loading.

(*d.*) There is no allegation in the libel that the ship was ever TENDERED to the libellants by the defendants, in any specified condition, at any time, or in any way, either on the 28th of June, when the loading commenced, or on the 30th of June, when it stopped.

In the absence from it of all, or even any one, of the above mentioned particulars, the libel would seem beyond all doubt to present no legal cause of action against the owners of the ship.

If defendants' evidence, showing that the libellants loaded the ship by incompetent stevedores, employed at cheap rates for the very purpose of making money out of the loading of the ship, is to be excluded, because "the pleadings presented no issue under which the said facts could be considered as legal evi-

dence," then we ask, in all fairness, that a similar rule be enforced against the libellants, and the result would necessarily be the dismissal of this libel as we have shown.

EIGHTH ASSIGNMENT OF ERRORS.

The findings fail to show any agreement, or assent, express or implied, by the defendants, to liability for possible loss, for delay in loading by any fixed date; therefore, said findings are insufficient in law to support the decree.

It appears affirmatively, that the contract of charter party became, on the 19th of June, the consummation and formal embodiment in writing, of certain verbal negotiations, which for several days had preceded it—yet nothing therein contained—and no statement whatever in the findings shows, any *expression of assent* by the captain or agents of the ship, or assumption, directly or indirectly, by them or either of them, of the extraordinary obligations of responsibility that seemed *certainly* about to result, if Gomila & Co. failed to complete the loading at the *time* stipulated in *his grain contract.*

We contend that under the circumstances shown by the findings in this case, the natural and legal conclusion is, that the formal contract, embodied and expressed, all there was of guaranty or condition on the subject, between the parties. We say, therefore, that it is only in the *absence* of a specific agreement, such as is shown in this case, and where there has been no culmination of negotiations into a formal contract, that parties are affected by notices given verbally.

Carver on Carriage at Sea, pp. 716, 717, in discussing this subject, says: "But the rule is subject to the exception that, if the party who has broken the contract, entered into it in contemplation of special circumstances, which would affect the consequences of a breach, *and* ACCEPT *these circumstances as* CONDITIONS, under which the contract was to be performed, THEN he is liable, etc."

See also same writer, p. 722, where he says, "But mere knowledge, or *mere communication to a contractor, that the contractee may lose special advantages, or suffer special consequences, if the contract be not punctually performed, will not in all cases make the contractor answerable for these special matters.*"

There is much in the conduct of the parties themselves in this case, as shown by the findings, which repels the conclusion of any *understanding* even, on the part of the captain and agents of the ship, that they *were bound to any time*, or were to be liable in the manner contended for. We invite attention to some facts in this connection.

(*a.*) The libellants had made and had on hand a confessedly losing grain contract for June loading, "*sellers' option.*"

(*b.*) They made the contract with the ship on the 19th of June, and although they had at first insisted on the 25th of June as a date to cancel the contract (see telegram in second finding, R. p. 222), the ship was not then ready for loading, which is the usual and customary method of holding ships to such a contract; they, the libellants, found it more convenient and advisable to *waive* the insertion of the 25th as the cancelling date, because, as the finding expresses it, "the ship was in port and they *had confidence in the ability and willingness of the master* to get the ship ready in time."

It will be observed, that the cancelling date was not waived, because of any agreement that the ship was to take the cargo on board in *time* to enable Gomila & Co. to comply with their grain contract. Not at all. If it had been so, the finding would have said so. If that cancelling date had *not* been *waived*, there would have been no suit for damages in this case, because, then, the remedy of Gomila & Co. would have been on the 25th, simply to *cancel the charter and get another ship.* It was, then, this

apparently very accommodating WAIVER of a cancelling date by Gomila & Co. that seems to have *created for them the opportunity* to attempt to foist upon this ship the burden of their loss from a speculative and losing grain contract. Again, the language of the finding is, that Gomila & Co. "had *confidence* in the *ability and willingness of the master.*" In other words, they *trusted* the master would load in proper time, therefore (as it seems to us clear) they had no positive agreement or even understanding he would load by the 30th of June, and that if he did not do so the ship would be liable for Gomila & Co.'s loss for not doing so. Our point is, that Gomila & Co. had under *commercial usage* a clear, well known and fair method to compel the ship to comply with her engagement, so far as related to the *time* of loading. That remedy was, the insertion of a cancelling date in the contract, and the annulment of the contract and procurement of another ship, if the contract was violated in respect to the *time* of loading. This being the usual and customary way of making such contracts, and of securing the loading of cargoes on ships, we think it clear that when Gomila & Co. *waived* the method customary, universally, in such contracts, they should, at their peril, have inserted in the charter-party contract, some other corresponding stipulation, or clause, or agreement to take the place of the one which *they had caused to be* ELIMINATED *from* it, and as the findings show no substitute for the customary remedy, thus eliminated from the contract, except "confidence and trust," then the libellants must be content with that, and nothing more.

(*c.*) The libellants, as "sellers" under the grain contract with Forestier & Co. had the "option" as to when the cargo would be "shipped." One right under this "option" was to have *commenced the loading earlier.* No excuse is given why the libellants failed to exercise this right. No, it suited the pleasure of the libellants to wait until the 28th of June, before they brought their elevator with the grain alongside the steamer, and

the loading was then, and not until then, commenced by them.

(*d.*) The ship was to receive a certain compensation as freight only, under her contract for the safe carriage of her cargo. No increased price was offered as a consideration for the ship to guarantee the performance of the speculative grain contract. Being without consideration, an agreement even for such unusual pecuniary risk would have been *nudum pactum.*

To recover in this case, the findings should have shown some positive agreement or consideration for the extraordinary and uncommercial act, before liability therefor can be fixed upon the ship.

NINTH ASSIGNMENT OF ERRORS.

The findings are insufficient in law to support the decree, in this: that no special TIME *was agreed upon for the performance, either in the contract of charter-party, or otherwise, therefore,* A REASONABLE TIME, *was the limitation, implied by law, for the performance of the contract.*

Much that has been said in discussing other matters, applies to the point now formally assigned as error, and therefore, to avoid repetition, we refer to what has been already stated on this subject, adding a few observations only.

It will be remembered that, by the terms of the grain contract, as expressed in the first finding, the libellants, as sellers, had *the option,* as to the time of the shipment of the cargo, that is to say, they had from the 7th of June, the date of the contract, until the 30th of June (midnight). Now, in addition to the facts: (1) that the contract of charter-party is silent as to the time of performance, and (2) that there was no agreement or assent by the representatives of the ship, expressly or impliedly, making a limitation as to the time of loading; we observe now, (3) that there is not a line in the findings going to show that the libellants ever notified or informed the ship, of any date at which they wished the loading should be commenced. As holders of this *option* as to the time of shipment, it was not only their right

under the grain contract, but, as regarded the ship, it was the *duty* of the libellants to have directed when the loading should begin, and to have done so earlier than the 28th of June. A close reading of the findings shows (and such was the fact), that the defendants had nothing to do with the loading, *especially* as to the time when it was to commence or end. The loading was done from the libellants own grain elevator when it was brought to the ship's side, and could not begin until the elevator and grain in barges and employés of the libellants came there. Why did not the libellants use the optional right they had and commence loading earlier. Clearly, it was the undue haste of loading in the waning hours of the very last day of June, hurried by *interruption of rain*, as well as being handicapped (if we may be permitted the use of the term) by the absence of a competent stevedore, that caused the ship to appear "full all over," only "as *then* loaded and stowed" by the *hasty work* of the inefficient and incompetent employés of the libellants.

The captain and agents of the ship had not bound themselves as to any fixed time for the loading. Their cable messages to the owners do not show any idea of a time fixed for the loading. There is also another important *fact* to be noted in this connection. The charter, Art. 15, in regard to *lay days*, contains the only *contract* stipulations in existence on the subject of the *time* for the commencement of the loading. It stipulates that the lay days were to commence "the day after the steamer is DECLARED *ready to receive cargo* and *having been passed by the surveyor of grain vessels*, and WRITTEN NOTICE *given by the master* to the charterers or their agents."

Now, by turning to the *third* bill of exceptions, paragraph five (R. p. 232), it will be seen that the following finding of fact was requested, to-wit: No. 5, "The lay days, under the terms of the charter-party, commenced on the 30th of June, because the certificate of the surveyor of grain, that the ship was ready to receive cargo, was not given until the 29th day of June."

The Court, in refusing to make this finding, said : "Because No. 5 *is a conclusion of law*, etc., * * *."

The fair interpretation of Article 15 of the charter, shows that the captain of the ship had the option to say *when* he was ready to commence loading ; and if he had, then this option, so given by the contract, cannot be denied to him, in consequence of anything that is merely to be *implied* from *parol* testimony of statements made by libellants at the time of, or before or since, the making of the contract. Article 15 contains no limitation whatever as to the duration of such option. It was clearly a *reasonable duration*, which might or not extend beyond the 30th of June, according to the election or option of the captain. Two things were required to be done : (1) the steamer must be DECLARED *ready to receive cargo* by the *surveyor* of grain vessels, and (2) the master must serve a *written notice* upon the charterers.

The findings make no mention of these important contractual pre requisites as to the proper method for determining *when the time for loading should begin*, and we are not permitted, of course, to refer to the record. We can only say, *arguendo*, that the lay days did not begin until the 30th day of June. We say, from the findings, that the loading was commenced on the 28th, without any formal *tender* of the ship, and hurriedly conducted by the libellants in the manner and with the result above stated.

Now, we submit, that it is simply irrational and absurd, to conceive a case, of a captain and agents of a ship, so explicitly stipulating as to the time for the commencement of the loading, in order to be certain when the small penalty of "SIX PENCE STERLING PER GROSS REGISTER TON PER DAY," should begin to run in favor of the ship, and leave to mere conjecture, or entirely at the option of the charterers, without any stipulation whatever, the same identical question of the TIME of the loading of the steamer, when a loss growing out of a speculative grain contract, already amounting to THOUSANDS OF DOLLARS, and

daily increasing in amount, was dependent on the question, as to when the loading of the ship should *begin, continue, or end.*

A business contract, made by business men, cannot be so interpreted.

TENTH ASSIGNMENT OF ERRORS.

The Court erred in condemning the defendants to pay libellants damages in the sum of $23,993 76, or any part thereof, and the decree therefor, was rendered upon findings of fact, which, taken in connection with the pleadings, are insufficient in law, to support said decree, in whole or in part.

The law of the State of Louisiana must determine the rights and obligations of the parties in this case, as the contract sued on was made in that State.

The most important provisions of that law, applicable to the case at bar, are to be found in Article 1934 (1928) of the Civil Code of Louisiana. The rules contained in this article, as was observed by the Supreme Court of the State in 10 An. 633, "were taken verbatim, from articles 1149 and 1150 of the Code Napoleon, and these articles of the French Code, in turn, from Pothier on Obligations, Nos. 159 and 160. Pothier drew them from the Pandects."

We quote the article in full, with exception of one section, which is manifestly inapplicable. The *italics* are our own.

Art. 1934 (1928): "Where the object of the contract is anything but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived, *under the following modifications and exceptions:*"

1. "Where the debtor has been guilty of no fraud or bad faith, he is only liable for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties, at the time of the contract. By *bad faith*, in this and the next rule, is not meant the mere breach of

faith, in not complying with the contract, but a designed breach of it from some motive of interest or ill will."

2. "Where the inexecution of the contract has proceeded from fraud or bad faith, the debtor shall not only be liable to such damages as were, or might have been, foreseen at the time of making the contract, but *also to such as are the immediate and direct consequence of the breach of that contract; but even when there is fraud, the damages cannot exceed this.*

* * * * * * * * * * * *

4. "*If the creditor be guilty of* ANY *bad faith which* RETARDS or prevents *the execution of the contract, or if,* at the time of making it, *he knew of any facts that must* prevent or *delay its performance, and concealed them from the debtor,* he is not entitled to damages."

5. "*Where the parties, by their contract, have determined the sum that shall be paid as damages for its breach, the creditor must recover that sum, but is not entitled to more.* But where the contract is executed in part, the damages agreed on by the parties *may be* REDUCED to the loss really suffered, and the gain of which the party has been deprived, unless there has been an express agreement that the sum fixed by the contract shall be paid, even on a partial breach of the agreement."

The decree in this case is rendered in manifest violation of the rules above expressed, in the following, among other particulars:

First. The fourth section of the article, precludes recovery by any creditor who is guilty of ANY *bad faith,* which RETARDS or prevents *the execution of the contract,* or if, at the time of making it, he knew of any facts that must prevent or *delay its performance, and concealed them from the debtor.*

The application of this rule to the facts found by the Court "to be correct and true," as set forth in the first bill of exceptions, is absolutely decisive of this case. The libellants were guilty of bad faith, in appointing incompetent stevedores to load

the ship, whose stowage was badly performed; in doing so at *cheap* rates, in order to make money out of the loading; in deceiving the defendants as to the true character of the stevedores so employed, by making and collecting charges therefor from the ship, which indicated they were *regular* stevedores, when they were not (see C. C. of La., Art. 1847 (1841); and in thus *retarding* the *proper* execution of the contract.

Second. If, notwithstanding the facts referred to, which show bad faith, misfeasance, and certainly concurring negligence on the part of the libellants, they are still adjudged to recover damages herein, then we say the Court erred in disregarding the distinction shown by the law in the second section of the article above quoted, between debtors in *good*, and debtors in *bad faith*. The section referred to *limits* the damages, where its inexecution has proceeded from fraud or bad faith, and the amount allowed by the decree of the Circuit Court clearly exceeds the limit so fixed, when the debtor was in *bad faith*.

If the debtors had been guilty of *fraud and bad faith*, under the limitations contained in this section, they would even then have been protected from the extraordinary loss of about TWENTY THOUSAND DOLLARS, caused by the sacrifice of the cargo by the AUCTION SALE.

It is only where the debtors are in *bad faith* that they are liable to "*such damages as are the immediate and direct consequences of the breach of the contract.*"

See the above article, sec. 3.

Third. The Court erred in failing to apply the limitations of liability expressly provided for in section five of the above article. By the terms of that section, under no possible circumstances could the amount of the damages allowed in this case, legally exceed the "ESTIMATED AMOUNT OF FREIGHT," because the parties, in section nineteen of the contract, had determined that sum should be paid as penalty for its non-performance, and

therefore, in law, the creditor, if entitled to anything, "must recover that sum, *but is not entitled to more.*" If the contract should be executed in part, as was done in the case at bar, the law declares that the damages might be *reduced* according to the circumstances, but there is no provision for increasing the damages beyond the amount of penalty so agreed on in the contract.

Fourth. As to the AMOUNT of the damages allowed.

The District and Circuit Judges differed very materially on this point—mainly, because the former disallowed, while the latter sanctioned, *the sale of the cargo at* AUCTION.

The District Judge allowed the difference between the contract price and the market price as appeared in the telegrams of DeWolf & Hammond to the defendants, dated June 30th, (see telegram in eighth finding), making the difference 3s. 3d. per quarter; to which he added 3d. for difference in freight, making 3s. 6d., which made the loss $8,426 25. Now, although the District Judge disallowed and condemned the sacrifice of the cargo at public auction, significantly terming it an "ATTEMPTED *sale at auction*" (the inference apparently being quite clear, from this expression, that it was not by that Court viewed as a *real* sale), he allowed for the charges which were paid the auctioneer for advertisement and fees, $934 72, making a total allowance by the District Court for damages $9,360 97. It is perfectly clear from the opinion, that the District Judge allowed the expenses attending the advertisement and *attempted* sale at auction, merely because by that method, a purchaser might be secured who would bid *more than the market price*, but as this was not realized, he condemned the sale at auction, because, to use his own words, "*I think* (said the Court) *that he* (Gomila) *was not justified in permitting a sale at lower terms than, the evidence shows, were the ruling terms.*"

See opinion of District Judge, R. p. 198.

But the District Judge erred in even allowing the *expenses*

of this auction sale. After the offer of the ship to take the balance of the cargo, when it had been discovered, by the employment of a regular stevedore, that the ship could do so when the cargo was properly stowed, and the ship had twice publicly *protested* against a sale at auction, the costs even, of such sale were not allowable, *because "it entailed expenses that might reasonably have been avoided,"* as the learned writer, Mr. Carver, says.

See Carver on Carriage at Sea, § 719.

11 M. & W. 228.

3 Wm. Rob. 158.

Lush. 138.

By turning to the seventeenth finding, R. p. 225, we perceive, at a glance, the radical difference both in the amount as well as details of the damages allowed by the Circuit Court, which, in view of what we have already said, we submit are not sustained by law, and must be set aside in any contingency. They must be greatly reduced, under any legal view of the defendant's liability. They will (as we confidently believe) be entirely rejected, because of the conduct of the libellants as shown by those facts which his honor, the Judge of the Circuit Court, found were "correct and true," but disregarded.

ADDITIONAL ARGUMENT.

Much of the argument of this case has necessarily been made already, in presenting the several assignments of error. Avoiding repetition as far as possible, we beg to be permitted to give some points only of the argument not already stated, with some additional authorities, and will do so as briefly as possible.

In stating and presenting the *First Bill of Exceptions*, as "an assignment of error," we dwelt on the importance of the facts found by the Court therein to be true and correct, and cited authorities showing, we submit conclusively, that the Court erred in disregarding said facts as evidence.

The authorities there cited by us establish conclusively, as we respectfully submit, that the Circuit Court erred in disregarding said facts as evidence, and assuming, as we confidently do, that in view of the principles of law and authorities there cited, this Court must and will accept and give effect, as evidence, to the said facts so found by the Court to be correct and true, we proceed now, in view of the importance of the evidence contained in said facts, to supplement what we have heretofore said, with some deductions and conclusions, which are naturally suggested by said facts.

We contend that if these facts are given their proper and legal effect as evidence, they must necessarily dispose of this suit, independently of all other defences; and in the further brief consideration now proposed, we beg that the analysis which we have heretofore made of these facts, *seriatim*, may be borne in mind.

(*a.*) First, in regard to the subject of the loading of the steamship by Gomila & Co., we remark, that it was not until after the trial in the District Court was over, and the appeal was pending in the Circuit Court, that the bill of Gomila & Co. for $524 50 for loading the steamer was introduced as evidence in the case. The contest in the District Court was fought on other grounds. The Circuit Court, as we have seen, under a too strictly technical view of the pleadings, disregarded the evidence.

(*b.*) In order that two of the most important facts relied on by us, as shown by these findings, to-wit: (1) that Gomila & Co. *loaded* the steamer, and (2) that they *designedly* employed *cheap* stevedore labor, in *order to* make a profit, by thus loading it, may have their full weight, not only as "facts" found in this case, but as facts that were *admitted* by the libellants, and cannot be denied successfully, we refer the court, *arguendo*, to the testimony of the chief libellant in this case, *not as evidence*, of course, but as a concurrent statement corroborating the correctness of the findings above referred to. Mr. Gomila tes-

tifies as follows: "The *regular* stevedores charge $1 75, and *Alfred and Neeb* DO IT, for a dollar and a quarter. *I charged the Deronda $1 75.* IT IS PART OF OUR PROFIT IN LOADING THESE SHIPS." (R. p. 182.)

The act of Gomila & Co., therefore, in charging and collecting $524 59 for loading the steamer, *as if* they had employed and paid regular stevedores for doing so, when they had employed *cheap* labor, and paid only $352 09, was done *designedly*, in order to make, as the quotation expresses it, a "*profit in the loading.*" The profit so made by Gomila & Co. out of the loading of the Deronda, was the difference between the two itemized bills, to-wit: *one hundred and seventy-two 50-100 dollars.* This difference between these two bills, by which these CHARTERERS made this *profit* of $172 50 out of the ship was effected by the libellants taking the bill of their employés, Alfred and Neeb, and increasing the several *items* of charges therein, as follows: the item of trimming the corn was increased from $1 25 to $1 75 per bushel; the item of sacking and sewing was raised from ¾ to 1½ per bushel, and the item of stowing 5,785 sacks was increased from 2c. to 3c. per sack.

Now, let us consider the legal relation of the parties at the time the libellants, *as loaders*, succeeded in making this "profit" out of the ship in that capacity. The libellants, *as charterers*, were under contract obligation to appoint a *stevedore* for loading the steamer. The business character of the stevedore to be employed was fixed in the contract by the stipulation touching his compensation, which was to be "at current rates for such labor." This stipulation required that "such stevedore labor" should be employed as the "current rates" of compensation should command. In other words, the character of the labor, as defined by the rate to be paid for it, required the appointment by the charterers, of a *regular* or competent stevedore. If this had been done, considering the admitted fact, that the ship could and did subsequently, when restowed

by a regular stevedore, carry the quantity guaranteed, there could not possibly have been any trouble.

If the loading had been done under the supervision of a regular and competent stevedore, *non constat*, but that the hasty and improper stowage would have been seen and remedied in time, to take the balance of the cargo in, on the 30th of June. If there was too much weight in the vessel from water ballast in the tanks or fuel in the coal bunkers, how perfectly easy it would have been detected by the eye of an experienced stevedore *while the vessel was being loaded*, and a sufficient quantity of either water or coal taken out as the loading progressed, without retarding or interfering with the loading. But, no, it did not suit the purposes of the libellants to place *an experienced stevedore* in charge of the loading.

It seems to us that the libellants, when they assumed the double relationship of LOADERS as well as *charterers*, entirely underestimated the protection given to the ship, by the requirement in the contract, in regard to the appointment by them of, as charterers, A STEVEDORE for the loading.

In order to arrive at a correct view of the responsibility of the duty assumed by the libellants in this connection, let us consider what are some of the recognized duties and functions of a stevedore. We say recognized and well understood, both in commerce and in the jurisprudence of all commercial countries for a period dating back into centuries.

Maclachlan, in treating on this subject, says: "Stevedore, a word in common use at all our great shipping ports, to denominate a person, whose business is, to undertake the stowage or discharge of cargoes with a gang of workmen, whom he hires and pays, and is responsible for. Familiar mention of such a person, with the same functions exactly, is made in the *Consolato del Mare*, where his name, in the original catalan of that celebrated collection of maritime law, is *Stibador*, the original, no doubt, of the word we use, and on that account remarkable as a

proof of the great authority in Europe, which these laws, at a very early period, had attained to." Maclachlan on Shipping, pp. 386-387. *Note.*

The same author has also very clearly stated the rule concerning stowage, when performed by stevedores under the appointment of the charterers. He says:

"In loading the cargo, therefore, care must be taken by the master, *unless* by usage or *agreement* this business is to be performed by persons hired by the merchant," and the master and owners are liable, without proof of personal negligence, "unless it appears that the shipper assented to the manner in which his goods were stowed, or that they were stowed by his own stevedore, without express orders or interference on the part of the master."

Machachlan on Shipping, p. 386-387.

There is no pretense, in this case, that the master in any manner interfered, and we submit herewith, authorities clearly showing, that where the charterer appoints the stevedore, at the ship's expense, and under the captain's directions, the charterer will still be liable for bad stowage, where the captain is not shown to have interfered with the stevedore in the loading.

Much stronger, of course, is the present case, where the charterers are shown, by their own bill and itemized account rendered, not only to have appointed the persons represented by them as *stevedores*, to load the ship, but themselves to have assumed the position and responsibility of *loaders* of the ship. For we hold that when a party renders and collects a bill of $524 59 "for loading" a ship, such party is estopped from saying "he did *not load* such ship."

Blakie vs. Stembridge, 2 L. J. (C. P.) 329.
Parsons' Shp'g and Adm., v. 1, p. 263, note 7.
Carver on Carriage at Sea, §§ 270, 274; do. § 272.
Desty on Shipping and Adm., § 263.
Flanders on Shipping, § 201.

Stevens on Stowage, p. 607.

Pritchard's Adm. Dig. v. 1, p. 499, Nos. 278, 280, 281.

The Catherine Chalmers, 32 L. T. 847.

It is usual to say, in contracts of this kind, "charterers are not to be held responsible for improper stowage." This we understand to refer to *third persons*, having goods on board that have been damaged. Certainly such a clause could not be construed, as between the parties to the contract, so as to enable a charterer to take advantage of his own wrong, so as to justify him in violating his obligations and duties, in the manner the libellants are shown in this case to have done, by the facts found by the Court to be "correct and true."

No one can, by contract, stipulate immunity from his own wrong.

Hutchinson on the Law of Carriers, § 14.

The principle here applied to carriers is equally applicable to charterers.

(*c.*) Our next contention in this connection is this: That in view of the said facts, so found to be "correct and true," the libellants cannot recover herein, because the said facts show them, as to the loading of said steamer, to be guilty of, at least, MISFEASANCE OR CONCURRING NEGLIGENCE.

Angel on Carriers, § 12, says: "It may be proper to notice the distinction between negligence and *misfeasance*. It seems to be this: that the former takes place in the course of performing the contract, the latter in an act done in direct contravention of it, by which its performance is prevented."

Sleat vs. Fagg, 5 B. & Ald. R. 342.

Ellis vs. Turner, 8 T. R. 531.

Garnett vs. Willan, 5 B. & Ald. R. 53.

"*The performance in an improper manner*, place or time, *which is not the party's right*, or even duty to do, *is a misfeasance.*"

Angel on Carriers, note 1, under § 12.

"When the negligent acts or omissions of the parties to the

action were contemporaneous, or, what is to say the same thing, when the catastrophe is the result of concurring or mutual acts of negligence, the plaintiff cannot recover damages."

Beach on Contributory Negligence, p. 60, and numerous authorities cited in note.

In Sedgwick on Measure of Damages, v. 2, p. 347, it is said: "We have already had occasion to advert to the principle, that the party seeking legal redress must not only show his adversary to be in the wrong, but must also be prepared to prove that no negligence of his own has tended to increase or consummate the injury, * * *."

In New York it has been held that: "*A party suing for negligence must come into court faultless.* He must not present a mere balanced case. The burden of proof is upon him, and he must satisfy the Court, by the greater weight of testimony, that, without any carelessness or blame on his part, he has suffered an injury."

Ernst vs. Hudson River R. R. Co., 24 How. Prac. 97.

Beach Contrib. Neg., p. 445.

(*d.*) Finally, to confirm the decree in this case, would be to enable the libellants to take advantage of, and profit by, their own wrong; a great wrong, committed by them, against the defendants, who from necessity had to confide in them as charterers of the ship; a wrong, the *mala fides* of which precludes the recovery of damages by them, not only under Sec. 4 of Art. 1934 (1928) of the Civil Code of Louisiana, which we have cited, but under the principles of the common law, and pre-eminently so, under the principles of the commercial law.

Gomila & Co. knew that the market "had declined and was still declining;" they were large grain dealers, and as such were necessarily familiar with the market prices; they knew, therefore, that, at about the date of the loading, the market price of the corn, then being loaded on the Deronda, had fallen about 3s. 3d. per quarter below the contract price, thus representing

then, a positive loss, either to the libellants or to their vendees, Forestier & Co., of about EIGHT THOUSAND DOLLARS. There was but one way to bring in a third party as a possible candidate to bear the loss of this speculative grain adventure, and that was, by proof of *verbal* declarations of libellants, which it is not pretended were ever *assented* to by the defendants, to *stretch* the *written* guarantee of the charter-party, so as to bring in the ship, and saddle upon her owners, *a loss which had already resulted*, from a fall in the market price of the commodity that was to be shipped.

Under these circumstances, the libellants took the loading of the ship into their own hands, violating their contract obligation by employing incompetent stevedores at cheap rates, with full knowledge of the importance to the ship, in that crisis, of having the presence and services of a competent stevedore, one who would be active and vigilant in performing the functions of that office, so that while the ship was being loaded, the quantity of coal or water ballast might be regulated as the exigences of loading might require, as well as to superintend the proper stowage of the cargo.

CONCLUSION.

In our discussion of this case, we have endeavored to present the cause of the defendants from a two-fold aspect, to wit: whether this Court would accept and give effect, as evidence, to the "findings of fact," made by the Circuit Court, but disregarded, as set forth in the first bill of exceptions, or, on the contrary, refuse so to do.

I.

Upon the first theory, to-wit: that this Court might disregard said "findings of fact," as evidence, we submit that the judgment appealed from should be reversed, in consideration of the several errors herein specifically assigned, the more particular points of which, may be recapitulated as follows:

(*a.*) Because there never was a formal tender of the ship as being in readiness to commence loading on the 28th, nor as being loaded on the 30th of June.

(*b.*) Because the violation of contract complained of was merely *passive*, and under the law of Louisiana, where the contract was made, and by which it is governed, no damages are exigible, because it has not been either alleged in the libel, nor shown in the findings of fact, that the defendants were either put *in mora*, or that they made *a waiver of default.*

(*c.*) Because the Circuit Court held the defendants strictly to the rule, that the *allegata and probata* should agree, and in doing so, and for that reason only, disregarded as evidence, the important facts, found to be correct and true, as set forth in the first bill of exceptions: That if correct in such ruling, then the Circuit Court certainly erred in not applying the same rule to the evidence and pleadings of the libellants, which, if done, must result in the rejection of libellants' suit, because the libel, for lack of proper allegations, which we have heretofore fully specified, presents, upon its face, no valid or legal cause of action against these defendants. In other words, admitting all its allegations to be true, there would be, *in law*, no case therein stated against these defendants.

(*d.*) Because the findings utterly fail to show, that there was any *agreement* or *assent*, of any kind, ever made by the defendants to any liability for extraordinary possible loss, for delay in loading the ship by any fixed date.

(*e.*) Because no special time for the performance of the contract having been agreed upon, either in the contract of charter-party or otherwise, the law necessarily implied *a reasonable time* as a proper limitation, in the premises.

(*f.*) Because the libellants having transferred the charter-party to Forestier & Co., they were without legal interest or capacity in law to bring or maintain this suit. The legal title to the charter-party, being, under the findings of fact as made, still in Forestier & Co., they alone could bring the suit.

II.

Upon the other theory, however, that this Court will receive and consider as evidence, the facts found by the Circuit Court to be correct and true, as set forth in the first bill of exceptions, which is the correct theory, and which, we humbly submit, we have conclusively shown by numerous authorities, cited and discussed at length elsewhere must be done, in that event, we submit with great confidence that those "facts" must cause the prompt reversal of a decree, which could not logically or justly have been rendered by the Circuit Court, if they had for one moment been considered *as evidence* by that Court.

The affirmation of the decree appealed from, with the "facts" mentioned, in evidence, would sanction conduct by the libellants, utterly at variance with the principles of right and justice.

As charterers, charged with the duty of appointing a competent stevedore to perform the loading, they elected, as shown by their itemized bill, rendered and paid therefor, to perform the loading themselves, through the instrumentality of their own employés, charging and realizing as their profit for *such* loading, the difference between the *cheap labor* actually employed, and the "current rate" that would have been chargeable, had a regular stevedore been employed by them; the result being a failure by the ship to take, "as *then* loaded," the guaranteed quantity, which a few days later was readily taken, when the stowage was re-arranged by a regular stevedore. *Such charterers*, we submit, are estopped from claiming damages resulting, in whole or in part, from *such loading*, operated *by themselves*.

III.

If, contrary to our confident belief, this Court should maintain the claim of the libellants herein for damages in any sum, then we respectfully submit, that the amount of $23,993 76, allowed by the Circuit Court, is not sanctioned nor sustained by law, for the reasons we have endeavored to present elsewhere.

The first item of $3,194 29, allowed as being amount of *commission* paid Forestier & Co., is clearly illegal. The item of $20,549 39, resulting from the sacrifice of the cargo, cannot be sanctioned by this Court, because it is in direct conflict with, and in violation of, well recognized rules and principles as to such liability, and precedents in commercial usage, governing and *limiting* the liability of ship owners in such cases, whose captain, in the present instance, repeatedly, but vainly, *protested* against such sale.

If *such charterers* are to be permitted to assume the role of *loaders* of the vessel, and by depriving the ship of its regular stevedore, and by the employment of *cheap* stevedore labor, clandestinely make a profit of ONE HUNDRED AND SEVENTY-TWO 50-00 DOLLARS by such loading, and the owners of the ship, in consequence, are indeed to be burdened with the loss resulting from the fall in the grain market, and the inexecution of this speculative grain contract of Gomila & Co., then, no doubt, his honor, the Judge of the District Court, stated the principle of liability correctly, when he held it to be "*the difference between the contract price and the market price.*" The latter, he found to be 3s. 3d. per quarter. (See Opinion, R. p. 198.)

In view, however, of the considerations hereinbefore submitted, the defendants also having shown conclusively that the libellants have not, "well and truly performed and kept all the covenants and undertakings on their part, in said charter-party, to be performed and kept," as alleged by them in their libel, and the consequent error in the decree in favor of the libellants herein being fully shown, the defendants respectfully and confidently pray that the judgment appealed from be reversed, and that they have judgment in their favor, and for costs.

J. McCONNELL,
Of Counsel for Appellants.

FILED
OCT 11 1888
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 33.

CULLIFORD & CLARK, APPELLANTS,

versus

GOMILA & CO., APPELLEES.

Brief for Appellees.

J. D. ROUSE,
WM. GRANT,
J. WARD GURLEY, JR.,
Proctors for Appellees.

NEW ORLEANS, October, 1888.

L. GRAHAM & SON, PRINTERS, 101 GRAVIER ST., N. O.

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Brief for Appellees.

STATEMENT OF THE CASE.

This suit was commenced in the United States District Court for the eastern district of Louisiana by the libel of Gomila & Co., for damages, for the breach of a charter party between them and Culliford & Clark, for the charter of the steamship Deronda.

The ship was attached and released upon stipulation to the respondents. The decree in the district court was in favor of the libellants, from which appeals were taken to the circuit court, where the decree was also in favor of the libellants, from which the respondents took this appeal.

The facts found by the circuit court include many incidental facts, as well as the ultimate facts upon which the decision of the case turned. The ultimate facts found are substantially as follows:

The libellants having sold for foreign shipment a cargo of corn of not over twelve thousand nor *under* ten thousand

quarters of 480 pounds each, to be delivered on sellers' vessel *in the month of June*, 1883, for the purpose of making such delivery, chartered said steamship from the respondents, who guaranteed the steamer to carry *not less* than ten thousand quarters of 480 pounds each.

During the negotiation of the charter party Gomila gave, as his reasons for insisting upon such guarantee, his contract of sale aforesaid, *which was produced and read* to or by the agents of respondents, and he stated "that he had no use for any vessel that would not carry ten thousand quarters of grain; that he must have a guarantee, and feared that if the vessel would not carry that amount the consequences would be serious; that the market had declined and was still declining, and the loss would be very heavy, because the buyer would have the right to reject the cargo if the conditions were not strictly fulfilled."

"The canceling date of the charter party was not fixed, because Gomila & Co. waived it, *as the ship was in port*, and they had confidence in the ability and willingness of the master to get the ship ready in time." See findings 1, 2, 3, 4 and 5, pp. 220, 221, 222.

On the 28th of June the ship *was ready* to receive cargo, and the loading then commenced, *with the consent of all concerned*, and continued until the afternoon of the 30th of June, when the loading was stopped, and the ship was declared by the underwriters' inspector to be *full all over* and ready to proceed on her voyage. She then had only 9635 quarters on board, and *could take no more with safety*, as she was then loaded and stowed, although the libellants had the balance of the cargo of 10,000 quarters alongside, and it could have been put on board before midnight if the ship could have taken it. See sixth finding, p. 222.

When the ship was loaded, as aforesaid, all parties had notice at once that she could not carry the quantity guaranteed, and efforts were made by libellants to avoid loss or to reduce it to the minimum; but the cargo having been

refused by the buyers, because it was short, and negotiations with the owners of the ship having failed, libellants decided to sell the cargo on board, with privilege of the charter, and so notified the agents of respondents, at the same time giving the respondents the option of taking the cargo at the price at which it had been sold. After notice thereof, given in the daily papers published in New Orleans, the libellants sold the cargo on board, with privilege of the charter, at public auction, which sale "was fairly conducted, and under the circumstances was necessary and proper for the protection of the rights of all parties." "Corn is a perishable article in shipping, both as to time and transit, and is always at risk in voyages across the ocean, particularly if it remains in the port of New Orleans, under the heat of a July sun beating on the decks, in which case the risk is increased every day it remains in port." See findings 8, 9, 10, 11, 15 and 16, pp. 224–226.

That although "the carrying capacity of the Deronda for grain, on voyages from New Orleans to Europe, *when properly fitted out*, was over 10,000 quarters," *as she was fitted out and prepared and tendered* to Gomila & Co., on June 28, 1883, *she could not with safety, under maritime and underwriters' rules*, carry a cargo of 10,000 quarters, and she failed to receive such cargo;" and "by the inability and failure of the steamer to receive, when first tentered to Gomila & Co., a cargo of 10,000 quarters," "the libellants lost the advantage of their said sale," and thereby suffered loss amounting to $23,993.76. Findings 14 and 17.

These ultimate facts establish the case of the libellants, as averred in their libel, excepting as to the quantum of damages, which is slightly less than the amount claimed by them.

The answer of respondents denied that the firm of Culliford & Clark were owners of the Deronda, and averred that Culliford was sole owner thereof, and that said firm

was the agent of said owners. The execution of the char ter party with Gomila & Co., declared upon in the libel, was admitted in the answer, but respondents averred a novation thereof by the substitution of Forestier & Co. (the purchasers of the cargo) for Gomila & Co. as charterers. Answer, p. 15.

Upon these points the court found "that Gomila & Co. did not authorize the surrender of their charter and the giving of a new one to Forestier & Co. save upon the condition that the Deronda should first execute her guarantee" (seventh finding, p. 222); and "that although J. H. W. Culliford was the sole owner of the Deronda, and respondent's firm of Culliford & Clark managing agents of said owner, yet the fact is that said firm held themselves out and dealt with the libellants in relation to the Deronda as owners thereof, and therefore are liable on the said charter party as owners to the libellants for all damages arising from the default under said contract." Eighteenth finding, p. 226.

And the court found as conclusions of law:

"1st. That under said charter party the defendants were bound under their guaranty to see that when the Deronda was tendered to the libellants for loading [that] she was fitted, prepared and arranged so as to be able to carry not less than 10,000 quarters of grain under underwriters' and maritime regulations.

"2d. That the said defendants were charged with full notice in law of the special objects and purposes of libellants in effecting said charter, and therefore are liable to the said libellants for the amount of damage suffered by the latter from inability to sell and deliver under the grain contract with Forestier & Co.

"3d. That the amount of such damages was the sum of $23,993.76.

"4th. That libellants should have judgment for that amount, with legal interest from June 30th, 1883, against

the defendants and against the sureties on the release bond in attachment."

The decree was in favor of the libellants for the amount of damages found as above. The case in the district court is reported in 20 Fed. Rep. 734.

ARGUMENT.

I.

The suit was properly brought against the firm of Culliford & Clark. Besides the fact that they held themselves out and dealt with the libellants in relation to the Deronda as owners thereof, they admit in their answer the execution of the charter party sued on, and aver novation and performance of the new contract. The plea is one of confession and avoidance, which estops them from denying the matter confessed. Like the plea of payment it excludes all other defences.

If they wished to dispute the authority of their agents to bind them they should have denied that they made the charter, instead of pleading performance.

It was urged in argument in the court below that inasmuch as Culliford owned the Deronda individually the firm of Culliford & Clark cannot be held liable in this suit. The argument was that, because Culliford & Clark charted a ship which did not belong to them, they as a firm could not be held on their covenants. The obvious answer to this is that a warrantor cannot set up his own wrong in discharge of his warranty.

Both partners are estopped to deny that property chartered by the firm was not made, *quoad* the transaction, partnership property, though it may have belonged to but one of the partners individually.

This suit, although brought in admiralty, is not against the ship, but against the persons who made the charter.

Property was attached as a mere incident of the suit for the purpose of compelling the defendants to appear

and answer the libel. Concede that the Deronda was owned solely by Culliford, it is not material, because the partners are liable severally and in solido for the whole claim, and the property of both or either might be seized.

Culliford cannot complain that his property was taken; nor had Clark any interest to complain, although, as to him, the attachment may not have given the court jurisdiction. But he has voluntarily appeared and answered without objection, which waives all defects in the process. *Atkins vs. The Disintegrating Company*, 18 Wall. 272.

In foreign attachments the writ may be levied upon any property or credits of the defendants. *Marro vs. Almeida*, 10 Wh. 473; *Atkins vs. The Disintegrating Company*, *supra*.

But the defendants never objected to the validity of the attachment by any pleading or motion. They answered the merits of the suit, merely stating in the answer that the Deronda was the individual property of Culliford.

How that fact, if true, could affect this suit, after appearance, without exception, we are unable to see. If the attachment was originally defective from that cause a timely motion should have been made to set it aside. Instead of doing this respondents voluntarily appeared and answered to the merits.

A plea in abatement is too late after issue joined; and a mere argument put forward in lieu of such a plea should not even be noticed.

II.

Out of an express contract an implied one often arises. In this case out of the express contract of the charter party there arose the implied one that the ship, when tendered, would be able to receive the cargo as guaranteed.

In *Work vs. Leathers* this Supreme Court said: "When the owner of a vessel charters her, or offers her "for freight, he is bound to see that she is seaworthy and "suitable for the service in which she is to be employed.

"If there be defects, known or not known, he is not ex-
"cused. He is obliged to keep her in proper repair, un-
"less prevented by perils of the sea or unavoidable acci-
"dent. Such is the implied contract when the contrary
"does not appear." 97 U. S. Rep. 379.

In *Ye Seng Co. vs. Corbitt* the owners of a vessel chartered her to carry passengers from Hong Kong to Portland, and stipulated in the charter party that she was "tight, staunch and strong, and in every way provided for said voyage." But upon her arrival at Hong Kong she was found by the surveyor of the port "not fit to carry passengers," and refused permission to do so by the local authorities; and it was held that even in the absence of the stipulation in the charter party, as to the character and condition of the vessel, the law would imply, from the undertaking of the owner, that she was, in all respects, fit to carry passengers out of said port. Upon this point the court said:

"The defendants expressly covenanted in the charter party that the Garibaldi was such a vessel, and in such condition (i. e., staunch and strong, and reasonably safe for passengers to risk their lives upon); and if they had not the law would imply a covenant on their part that the vessel was fit to do what they undertook to do with her, carry passengers out of Hong Kong." 7 Sawyer's Rep. 375.

In *Stanton vs. Richardson* the charter party provided that the ship should load a full and complete cargo of sugar in bags, etc. It likewise specified different rates of freights for dry and wet sugar. A cargo of *wet* sugar was provided by her charterer, and when it had been nearly all shipped it was found there was such an accumulation of molasses in the hold, the result of drainage from the sugar, that the ship would not be seaworthy for her voyage if she proceeded in her then condition. The sugar had to be unloaded again, and the charterer refused to reload it or to provide any other cargo.

Cross actions were brought—one by the shipowner against the charterer for refusing to provide a cargo, and the other by the charterer against the shipowner to recover damages by reason of the ship not being fit to carry the cargo provided for her.

And upon the finding that the ship was not fit to carry a reasonable cargo of wet sugar, and could not have been made fit within such a time as would not have frustrated the object of the adventure, it was held that the charterer was entitled to succeed in both actions, and with respect to his action that all damages necessarily occasioned by such breach of contract were recoverable. L. R. 7, C. P. 421; 3 Eng. [Moak] 314.

This case was affirmed (L. R. 9, C. P. 390; 10 Eng. [Moak] 223); and Chief Justice Cockburn said: "The ship owner was bound, under this charter party, *to have his ship fit* to take a cargo of wet sugar, and the ship was unable to do so. There is, therefore, a breach of the shipowner's engagement."

In *Lyons vs. Wells* Lord Ellenborough says: "In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel, ready to carry goods for him, and the person putting goods on board or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, *implied by law*, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public." 5 East. 429.

And see *Havelock vs. Geddes*, 10 East. 564; *Tarrabochia vs. Hickey*, 1 H. and N. 183.

Applying these principles to this case it is clear that the libellants must recover. When the ship was offered for loading the libellants had a right to rely and did rely upon the implied contract *that she could then take* the guaranteed cargo. They had no means of ascertaining the fact but by loading; and when the loading was complete, and the guarantee unfulfilled, it was too late to secure another

vessel, and the object of the adventure was entirely frustrated.

Although we might insist, upon reason and authority, that the notice which defendants had of the sale of the cargo for June shipment raised an implied agreement in law, on the part of defendants, that they would have the ship ready and receive the cargo on board in June, it does not seem necessary for us to do so to maintain this suit.

In most, if not all, of the reported cases the court seems to have grounded the right of recovery on the mere fact of the notice; but the whole doctrine is necessarily based upon the principle that when one of the contracting parties has notice that his default will cause damage to the other he impliedly promises to so execute his contract as to prevent the injury. The authorities upon this point will be cited in connection with the question of damages.

III.

Because there was no canceling date fixed in the charter party, respondents had not their own option as to the time when they would tender compliance with their contract, but were required to do so within a reasonable time under the circumstances.

Where a lease for a term of years did not specify when the term should begin it was held to begin immediately. *Jaques vs. Millar*, L. R. 6 Chancery 153; 22 Eng. [Moak] 728; *Doe vs. Benjamin*, 9 A. and E. 644; 36 E. C. L. 228.

When no time is fixed by a contract within which the mutual stipulations are to be performed, either party may claim an *immediate* performance. *Dawson vs. Duplantier*, 15 La. R. 297; La. C. C., art. 2050.

In all commercial and maritime affairs time is an element of great value and importance. If the ship is not ready when she should be the charterer may seek another ship; if the cargo be not ready the owner may seek another cargo. 1 Parson's Ship. and Ad. 310, citing *Weiser vs. Maitland*, 3 Sandf. 318, and many other cases.

No case goes beyond allowing a reasonable time, which is in such cases exceedingly short, and all hold the carrier liable for damages if he is in fault. 3 Sutherland on Damages 213.

But the libellants' right to damages does not at all depend upon any implied agreement to receive the cargo on board in June. There was an express covenant that the vessel would take 10,000 quarters. This defendants violated before the time had expired, and the libellants, damages then accrued.

But for the failure to take the guaranteed quantity the cargo would have been loaded in June. The breach of warranty was complete in June, and the law gave defendants no right to repair it afterwards.

In *Cable vs. Leeds*, 6 La. A. 293, it was held that where a mechanic undertakes to make and deliver a piece of machinery as soon as possible, and actually delivers the machinery, but so defective that it will not answer the purpose intended, he will be considered in default from the time of the delivery of the defective machinery, and will be held responsible for the damages the other party may have suffered from the delay caused by the defective work.

The damages accrued when the ship was in default. The fitting of the ship for the voyage was the act of the owners and entirely under their control. The master exercised his discretion in selecting Sydney as the port for coaling, and fitted his vessel accordingly, and in such a manner that she could not take the guaranteed quantity of grain.

If one voluntarily puts it out of his power to do what he has agreed he breaks his contract, and may be sued immediately. Bishop on Contr., sec. 690, and cases cited.

The default of the ship was ascertained at 3:30 o'clock P. M., June 30th, when the "loading was stopped and the ship declared by the underwriters' inspector to be full all over and ready to proceed on her voyage." (Sixth find-

ing, p. 222.) She then lacked 365 quarters of the guaranteed quantity. (*Ibid.*)

On the same day the ship's agents cabled the respondents: "Deronda *loaded;* carries 9635 quarters." And, again, July 3, they cabled: "Ship full all over." (Eighth finding, p. 223.) These are positive declarations of respondents' agents that the vessel was unable to carry the guaranteed quantity.

When a right of action has accrued for breach of a contract such right cannot be defeated by a subsequent tender of performance. *Gould vs. Banks*, 8 Wend. 562.

No effort was made to put the ship in condition to receive the balance of the guaranteed cargo, nor any offer to do so, until the 6th of July, when the ship's agents notified Gomila & Co. that they would take out coal and make room for the balance of the cargo. (Eleventh finding, p. 224). But it was not until the 13th of July that the ship was tendered and balance of cargo demanded. (Twelfth finding, p. 224).

Even if the respondents had the right to discharge coal and water in order to make room for the balance of the cargo it was not done within a reasonable time. In commercial transactions time is often the essence of the contract, and in this case it was especially so. A delay of thirteen days in restowing the cargo and refitting the vessel, even if the defendants were entitled to some delay for that purpose, was unreasonable. But they were not entitled to any delay. The damages had been already inflicted. While courts of equity will sometimes relieve a party from the consequence of his breach, where time is not of the essence of the contract, and no injury has been inflicted on the other party, they will never do so where the breach was his fault and an injury has resulted. The reason of the rule is that the damages are the property of the complaining party, and the court cannot take them away from him.

IV.

The general rule is, that the party injured by a breach of contract is entitled to recover all his damages, including gains prevented, as well as losses sustained, provided they are certain and such as might be expected to follow the breach, if the special circumstances under which the contract is made are communicated and made known to both parties. *Messmore vs. N. Y. Shot and L. Co.*, 40 N. Y. 422; *Griffin vs. Colver*, 16 N. Y. 489; *Starbird vs. Banows*, 38 N. Y. 230; *Booth vs. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487; 13 Eng. Reps. 52, Moak's note, (collecting all the authorities); 22 Eng. Rep. 734, note; *Deming vs. Railroad*, 48 N. H. 455 (where the leading authorities are reviewed;) *Hodley vs. Baxendale*, 9 Exch. 341; *Ye Seng Co. vs. Corbitt*, 7 Sawy. 368; 3 Sutherland on Damages, 230–4; 2 *ibid.* 402.

The law of Louisiana, as well as the common law, recognizes this rule in awarding damages. Civil Code, art. 1934.

In *Goodloe vs. Rogers*, 9 La. Ann. 273, the rule was applied to contractors for the erection of machinery for the purpose of taking off a sugar crop, when the loss of the crop was held to be the natural and proximate result of the breach of the contract, and such damages within the contemplation of the parties. The court, referring to the above cited provision of the code, said:

"The rule, with its modification, is taken verbatim from the Code Napoleon, articles 1149 and 1150. And those articles of the French Code, in turn, were borrowed from Pothier on Obligations, Nos. 159 and 160. It must not be supposed, however, that Pothier was the author of the rule. He tells us himself that it is as old as the Roman law, and gives us the texts of the Pandects in which it was expressed. It is known to American jurists by the name of consequential damages, and these are distinguished into proximate and remote. Mr. Sedgwick, in the third chapter of his treatise on the measure of damages, has

collected authorities on this subject from many different quarters. From his researches it appears that the doctrine of the civil and common law is not materially different."

See also *Goodloe vs. Rogers*, 10 La. Ann. 631; *Lobdell vs. Parker*, 3 La. R. 332; *Rugely vs. Goodloe*, 7 La. Ann. 294.

The rule has been applied to sales of merchandise. Thus, when the vendor knows that the purchaser has an existing contract for a resale at an advanced price, and that the purchase is made to fill such contract, upon breach the purchaser may recover the profits upon the resale of which he has been deprived by the fault of the vendor. *Messmore vs. N. Y. Shot and L. Co., supra;* 1 Sutherland on Damages 82; *Deming vs. Railroad Co.*, 48 N. H. 455. And parol evidence is admissible to show knowledge of the circumstances and motives of the contract. *Messmore vs. N. Y. Shot and L. Co., supra;* 1 Greenl. Ev., sec. 286; *Campbell vs. Short*, 35 La. Ann. 447.

"It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made." *Merriam vs. U. S.*, 107 U. S. R. 441; *Merchants' Mut. Ins. Co. vs. Allen*, 121 U. S. R. 68; *Clarke et al. vs. Crabtree*, 2 Story 87.

In this case libellants made known to defendants the object of their making the charter party. They read their contract of sale of a cargo of corn for June shipment, of not less than 10,000 quarters, to the ship's agent and master, and informed them that the quantity must be guaranteed, and that default of defendants would entail very heavy loss. They come, therefore, within the rule that the special damages which would ensue upon failure of the defendants to take the gauaranteed quantity in time to enable charterers to reap the advantages of their contract,

must have been contemplated by them; and their actions and correspondence show this.

"When a carrier from mere negligence, from a plain violation of duty, omits to transport merchandise beyond a reasonable time, and its market value falls in the meantime, the true rule of damages is the difference in its value at the time and place it ought to have been delivered and the time of its actual delivery." *Ward et al. vs. N. Y. Cent. R. R. Co.*, 47 N. Y. 29; 3 Sutherland on Damages 216, 218.

For the measure of damages for breach of a contract to sell see *Engell vs. Fitch*, L. R. 4 Q. B. 659; L. R. 3 Q. B. 314, explaining *Flureau vs. Thornhill*, 2 W. Black. 1078, and approving the general rule laid down in *Robinson vs. Harmon*, 1 Exch. 850, that when a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed. *Bain vs. Fathergill*, L. R. 6 Ex. 59; 2 Kent. (12th ed.) 480, note, *damages; Masterton vs. Mayor of Brooklyn*, 7 Hill 62.

Gomila & Co. used every possible effort to diminish the loss. They offered the cargo to the owners at the same price at which they had sold to Forestier & Co., but the owners refused it. Owners would do nothing at all. Gomila & Co. then cabled to England and France for quotations and offers, and the replies were all at so low a figure, and the risk of rapid deterioration of the cargo under the influence of a southern July sun was so great, that it was deemed best to sell at auction. The owners were so advised, public notice was given for several days in the daily newspapers of New Orleans, and the sale publicly made in the usual manner by a regular and licensed auctioneer, to the highest and last bidder. See 10th and 11th findings, p. 224.

Such a sale has the sanction and approval of the authorities. *Sands & Crum vs. Taylor & Lovett*, 5 Johns. 395;

Girard vs. Taggart, 5 Serg. & Rawle 19; *Martens vs. Adcock*, 4 Esp. Rep. 251: *Greenwood vs. Cooper et al.*, 10 La. An. 796; *Henderson et al. vs. Maid of Orleans*, 12 La. An. 352; *Camp vs. Hamlin*, 55 Ga. 259; *Pollen vs. Le Roy*, 30 N. Y. 558; *Spraiger vs. Berry*, 47 Me. 331; *McLean vs. Dunn et al.*, 4 Bing. 722.

In the case of *Sands & Trump vs. Taylor* all the members of the court, separately concurring, held: "The vendor being, by the refusal of the vendee to accept the wheat, at liberty to abandon it or to dispose of it, *bona fide*, as agent of the vendee, to the best advantage, *by a sale at auction*." And Chancellor Kent, then the chief justice of the court, in expressing his opinion, said: "Nor was the subsequent act of the plaintiffs, in selling the wheat not delivered, a waiver of their claim for damages for non-performance of the contract. The usage in such cases is to sell the article after due notice to the other party to take it, and that in default of doing it the article will be sold. This usage is convenient and reasonable, and for the best interests of both parties.

"What was said by Lord Ch. J. Parker, in *Cuddee vs. Rutter* (5 Vin. 538), goes in support of this practice. The vendor ought to have the benefit of that principle as well the vendee. It would be unreasonable to oblige him to let the article perish on his hands and run the risk of the solvency of the buyer. The course adopted was proper and ought to be sanctioned."

Owners had full opportunity to protect themselves. Gomilla & Co. were not exporters of this grain. They had sold for delivery on board vessel in this port. They were not obliged to send the cargo forward and take the risk of its condition when it arrived on the other side. Unloading and then selling here would have been very expensive and most probably much more disastrous. A public sale was the truest test of value.

Respondents' agents were notified of the sale. (Tenth finding, p. 224). The sale was fairly conducted, and un-

der the circumstances was necessary and proper for the protection of the rights of all parties. (Sixteenth finding, p. 225). In explanation of this finding the circuit judge said:

"It seems to me that under the circumstances, where the cargo was liable to spoil, and where the defendants would do nothing, and the libellants' title not only denied, but could not be sure of making delivery, the libellants, even if they were financially able, were not bound to attempt to carry the cargo. A sale at auction, where all parties could protect their interests, was fair to all concerned. If at that sale the price was lower than a clear cargo, certain of delivery, would have brought, it is attributable to the conduct of the defendants, who did nothing to protect themselves and embarrassed the libellants in trying to straighten out complications." P. 227.

Gomila & Co. might have loaded the vessel after the breach of the warranty and sent the cargo forward without thereby waiving their claim for damages. *Phillips, etc., vs Seymour*, 91 U. S. 646.

The sale of the cargo with privilege of the charter, therefore, could not release the damages which had occurred. It merely fixed the amount of the loss. *Sands et al. vs. Taylor et al.*, 5 Johns. 410; *Maclean vs. Drum*, 4 Bing. 722.

The measure of damages was correctly arrived at. The chief damage was the direct consequence of the loss of the sale to Forestier & Co. The price of the sale to them was fixed by the contract. The price obtained at the auction sale was the only evidence of the value at that time. The respondents' agents were notified of the sale and suggested no better mode of fixing the measure of damages.

Neither does it appear that any objection was made in the court below to the mode adopted by the court for fixing the measure of damages, or to the amount found, or that any finding upon this point was requested by respondents.

The only reference thereto is in their bill of exceptions

No. 2, p. 230, where their objection is that the finding, No. 17, fixing the damages, is a conclusion of law and therefore inoperative as a finding of fact. Their failure to make other objections to the finding, or to ask the court to find otherwise, indicates that they were then satisfied with the finding and was a waiver of any other finding upon this subject. *The S. S. Osborne*, 104 U. S. 183; *Lumber Co. vs. Buchtel*, 101 U. S. 633.

The finding thus became equivalent to a general verdict assessing the damages, and cannot be reviewed here. *Insurance Co. vs. Folsom*, 18 Wall. 237; *The Benefactor*, 102 U. S. 214.

The respondents now assign for error the allowance as damages of the amount paid by libellants to Forestier & Co. ($3194 29) in settlement of their claim for losses entailed by libellants' inability to deliver the grain as they had agreed. Their complaint is based upon the use of the word commission by the court in its seventeenth finding; but, as respondents say, Forestier & Co. were purchasers and therefore could be entitled to no commission as such upon their own purchase. But it appears from the first, seventh, eighth and ninth findings, pp. 220, 222, 223 and 224, that Forestier & Co. were filling an order, or had resold such cargo as Gomila & Co. had agreed to deliver for June shipment, and that by their failure they lost the profit or commission they otherwise would have made. The libel charges this item of damage as amount paid E. Forestier & Co. for non-fulfillment of contract, as per annexed statement marked X, which statement shows that the amount allowed is composed of difference between the prices at which they had bought and resold the grain; insurance paid thereon by them; the difference in exchange, and their cable expenses. (Pp. 4, 5.) The amount allowed by the court is the same as that claimed in and thus itemized in the libel, and was an allowance thereof. Forestier may, from the name, be presumed to be a Frenchman, or at least of French origin, and in the French and

probably in other continental languages the term commission includes such profits as would have been made by Forestier & Co. if the sale had been completed.

In the "Dictionnaire de Législation," of CHABROL-CHEMEAU, among other definitions of the word commission is the following: "*Un acte par lequel un négociant charge d'autres négocians d'acheter et de vendre des marchandises pour son compte, moyennant un certain bénéfice qu'il leur accorde; c'est dans ce sens que l'on doit faire la commission.*"

It was undoubtedly in this sense that Forestier & Co. used and the court adopted the term.

VI.

Forestier & Co. had a right to refuse acceptance of the incomplete cargo. The conditions of their purchase were the delivery on board of seller's vessel of *not less* than ten thousand quarters during the month of June, *not later* than the 30th, midnight. These were the conditions precedent, the non-fulfillment of which frustrated the object of the contract. *Lowber vs. Bangs*, 2 Wall. 728; *Behn vs. Burness*, 3 Best & Smith, 751; S. C. 113 E. C. L. 749; 8 Law Times 207; *Dethon vs. Fosdick & Co.*, 1 Woods 286; *Glahoim vs. Hays*, 2 Manning & Granger, 257.

The contract for 10,000 quarters was an entire one, and Forestier & Co. were not bound to accept any less quantity. *Reuter vs. Sala*, L. R. 4 C. P. Div. 239; 30 Eng. Rep. (Moak's) 518.

The inability of Gomila & Co. to deliver the grain according to their contract entailed upon Forestier & Co. the loss of their profits upon the resale thereof, and they had a right to require Gomila & Co. to make them whole, which they did.

Their liabilty to Forestier & Co. was the immediate and direct consequence of the breach of the charter party, and the amount paid by them in discharge thereof was properly allowed. The loss on 365 quarters or 3126 bushels, balance

of cargo, was a direct result of the breach of warranty, in face of a falling market. There was no complaint in the court below against the finding thereof as an item of damage. The objection now made by respondents in their twelfth assignment is, that it is "unsupported by any finding of the market value of that quantity of corn," etc. The finding of the ultimate fact is all that was required, and the finding of the incidental fact suggested was unnecessary.

VII.

In the foregoing discussion we have dealt with the facts as found by the court, assuming that this court will accept such findings as conclusive, and will consider only the law arising out of the fact, in accordance with the rule laid down in *The Abbotsford*, 98 U. S. 440, and followed in *The Benefactor*, 102 U. S. 214; *The Connemara*, 108 U. S. 353, and numerous other cases.

Nothwithstanding the rule, the respondents annexed to their bills of exception all the evidence in the cause, which was allowed, "the court not feeling at liberty to refuse the defendants the right to attach the entire record, considering that the opinion of the Supreme Court in the case of *Francis Wright*, 105 U. S. 387, gives such a right in a bill like this." R., p. 230.

The ruling in the *Francis Wright* case goes no further than to permit an exception when the circuit court neglects or refuses, on request, to make a finding one way or the other on a question of fact *material* to the determination of the cause, when evidence has been adduced on the subject; or when the court, against remonstrance, finds a material fact which is not supported by any evidence whatever. But the fact must be a material and ultimate fact, affecting some issue in the cause; not incidental facts which only amount to evidence bearing on the ultimate facts of the case. This ruling was adhered to and affirmed in *Merchants' Ins. Co. vs. Allen*, 121 U. S. 67.

The bills of exceptions should show that the facts which the court refused to find were material, ultimate facts at issue, by stating the issue, not merely alleging the facts generally to be material, and should specify the particular evidence relied upon as proof thereof, stating all the evidence upon the issue, pro and con.

So also the bills of exceptions to facts found, of which there was no evidence whatever, should show that such facts were material, ultimate facts, necessary to support the decree made in the case.

Tested by these rules the respondents' bills of exceptions are clearly insufficient. The facts which the court refused to find are not shown to be material to any issue, and are merely incidental facts or matters of evidence.

So the facts found, which it is alleged are not supported by any evidence, are none of them ultimate facts, and that they are not material to any issue in the case is averred in respondents' bill. (R., p. 230). A mere inspection of the bills of exceptions will satisfy the court upon these points. Respondents' bill No. 1, pp. 228, 229, sets out certain evidence relating to stevedore's charges and storage of the vessel. The pleadings presented no issue relating to either, and the charter expressly provided that the "charterers were not to be held for improper storage." R., p. 8.

Their bill No. 2, p. 230, does not correctly state the finding No. 3 complained of. That there was some evidence in support of the sixth and sixteenth findings appears from the eighth and eleventh findings respectively, which were unquestioned; and the only fact complained of in the eighth finding is explained by the other facts found therein. The objection to the twelfth finding is shown by defendants' bill No. 5, p. 234, to be unfounded. The insufficiency of the objections to the seventeenth finding has been shown above.

The only issues in the case are, as stated by the court: ownership of the Deronda; whether or not the charter

was transferred, and whether or not the guaranty was complied with. The bill of exception does not show that the facts, alleged to be found without any evidence thereof, bear upon either of them.

In fairness to the court the material issue or ultimate fact should have been stated in the bills, together with the evidence upon it, *pro* and *con*, so that the court might see and correct its error if one had been made. Instead of doing so respondents excepted to isolated incidental findings, alleging but not showing them to be material, ultimate facts, and asked the court to send up all the evidence, hoping that this court would search the record and make new findings. If you should review the evidence the correctness of the findings must remain unimpeached.

The conclusions of law are supported by the facts found, and the decree should be affirmed.

Respectfully submitted,

J. D. ROUSE,
WM. GRANT,
J. WARD GURLEY, JR.,
Proctors for Appellees.

NEW ORLEANS, October, 1888.